

State of South Dakota Office of the Governor

Indian Child Welfare Act Commission Report



Volume I Narrative and Recommendations

December 30, 2004

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1. List of South Dakota Supreme Court Opinions discussing ICWA
 - a. Indian Child Welfare Act
2. Senate Bill 211 as originally submitted and Senate Bill 211 as amended.
3. List of Appointments
4. June 2, 2004 letter from Chairman Harold Frazier and August 10, 2004 response from Governor Rounds
5. Tribal Resolutions: Yankton, Standing Rock and Crow Creek
6. Agenda and minutes of May 25, 2004 ICWA Commission Meeting in Pierre
7. List of barriers received from Commission members Murphy, Eggebraaten and Wieseler
8. Supreme Court Order of July 8, 2004
9. Agenda and minutes of August 10, 2004 ICWA Commission Meeting in Sioux Falls
10. ICWA Compliance Analysis Update: Memo dated August 9, 2004
11. Roundtable transcript of August 10, 2004 Focus Group
12. Summary of September 10th Listening Session, Crow Creek/Lower Brule – partial roster of those in attendance and written submission of Stan Schmidt
13. Summary of September 10th Listening Session, Yankton Sioux Tribe, BIA Courthouse, Wagner, South Dakota – partial roster of those in attendance and no written submissions received
14. Summary of September 14th Listening Session, Standing Rock Sioux Tribe, BINGO Hall, McLaughlin, South Dakota – partial roster of those in attendance and written submissions:
 - a. Anonymous letter dated February 18, 2003;
 - b. “What’s really going on here? One families struggle to reunite

- and keep their family together.” submitted by T.M. & V.T. Three Legs
- c. Native American Training Institute Brochure
15. Summary of September 15th Listening Session, Cheyenne River Sioux Tribe, Super 8 Conference Room, Eagle Butte, South Dakota – partial roster of those in attendance and written submissions:
 - a. Good Bye letter, submitted by Naomi Johnson
 - b. Child Support Order, submitted by Pauline Alva Eagle Chasing, aunt of Delvin Eagle Chasing Baumgarten (names redacted)
 - c. Cheyenne River Sioux Tribe’s Ordinance No. 48, Alcoholic Beverages Control Law
 16. Summary of September 17th Listening Session, Rosebud Sioux Tribe, Tribal Council Chambers, Rosebud, South Dakota – partial roster of those in attendance and written submissions:
 - a. Good Bye letter, submitted by Naomi Johnson
 - b. Memo – College students and food stamps, and graph of Population Projections, submitted by Melissa Turney
 - c. Marge & Webster Two Hawk’s Six Year Fight with DSS for their Granddaughter, submitted by Marge Two Hawk
 - d. In Search of Mother Turtle, submitted by Mary Black Bonnet
 - e. Respondent Father’s Closing Argument, submitted by Todd Fasthorse (names redacted)
 17. Summary of September 24th Listening Session, Oglala Sioux Tribe, Pejuta Haka College Center, Kyle, South Dakota – partial roster of those in attendance and written submissions:
 - a. Quote from John Wayne, No Child Left Behind & Indian Child Welfare Act of 1863, and Codification of Lakota Oral Laws, submitted by Cornell Conroy
 - b. Letter from Olivia One Horn, submitted by Olivia One Horn
 18. Summary of September 24th Listening Session, Oglala Sioux Tribe, Sacred Heart Meeting Hall, Pine Ridge, South Dakota – partial roster of those in attendance and written submissions:
 - a. Letter of February 23, 2004 from Senator Tim Johnson, submitted by Duane A. Martin, Sr.
 - b. Letter of September 24, 2004 from Lakota Tiwaha Tokata Ho (Lakota Family Future Voice) to the ICWA Commission, submitted by Carol Iron Rope Herrera, CEAP
 - c. Letter of February 28, 2003 from Jackie J. Heier, Outreach Coordinator for Senator Tom Daschle, to James W. Ellenbecker, with photographs of children, submitted by Candace Stands Yellow Cloud
 19. Summary of September 25th Listening Session, Minnehaha County Commission Meeting Room, Sioux Falls, South Dakota – partial roster of those in attendance

20. Summary of October 8th Listening Session, Sisseton-Wahpeton Oyate and Flandreau Santee Sioux Tribes – partial roster of those in attendance
21. Summary of October 11th Listening Session, Rushmore Plaza Holiday Inn, Rapid City, South Dakota – partial roster of those in attendance
22. Agenda and minutes of October 12, 2004 ICWA Commission Meeting in Rapid City
23. Letter dated November 2, 2004, from Bob Walters concerning CRST declining participation in online surveys.
24. Public Service Announcement from Parents Who Care Coalition and Voice of Women
25. Standing Rock Sioux Tribe Child Protection Team Report and Statistics
26. Additional submissions:
 - Seven submissions from Hazel Bonner:
 - a. Final document providing input on South Dakota’s compliance with the Indian Child Welfare Act
 - b. Least restrictive alternative in child placement
 - c. Comparison of active efforts to reunite families requirements of ICWA and ASCF
 - d. Comparison of Effects of Welfare Reform 1994 – August 2002
 - e. Summary of problems I see with DSS and ICWA
 - f. It was a mistake to ask for help – Child taken from mother
 - g. Proposal for partnership between Oglala Lakota College and South Dakota Department of Social Services for recruiting and training Native American foster parents.

Letter dated October 10, submitted by Jeremy Tiger

Letter dated October 19, submitted by Parents Who Care Coalition

Letter dated October 21, submitted by Danny and Kristi Lee, foster parents

Letter dated October 23, submitted by Cynthia Hausman, foster mother

Letter dated October 25, submitted by Sarah Trimble, DSS Social Worker

Letter dated October 26, submitted by Chris Pankratz, DSS Social Worker

Letter dated October 26, submitted by Margaret Eagen, CRST Attorney

Letter dated November 1, submitted by JoLynn Bostrom, DSS Social Worker

Letter dated November 1, submitted by Lynne Eixenberger, DSS Social Worker

Letter dated November 4, submitted by Patricia King

Letter dated November 9, submitted by Steven Green, Springfield Academy
Letter dated November 14, submitted by Naomi Johnson
Letter dated November 16, submitted by Central District Supervisors
Letter dated November 18, submitted by Joan A. McMillin, Executive Director of
National Association of Social Workers
Letter dated November 22, submitted by Vicki Burger
Letter dated November 26, submitted by LuAnn Van Hunnik, DSS Supervisor
Letter dated November 28, submitted by Leon Larvie
Letter dated December 1, submitted by Lorna Turgeon, former DSS worker
Letter dated December 6, submitted by Angela Snyder
Letter dated December 9, submitted by Joan McMillin, NASW
Letter dated December 10, submitted by Hugh Grogan, former tribal social worker
Letter dated December 12, submitted by Allison Hedge Coke
Letter dated December 23, submitted by Stan Schmidt

27. Agenda and Minutes of December 14, 2004 ICWA Commission Meeting in Pierre
28. Lakota Oyate Wakanyeja Owicakiyapi Inc. (Oglala Lakota Integrated Tribal Child and Family Services Agency)
29. National Council of Juvenile and Family and Judges: Indian Child Welfare Act Checklists for Juvenile and Family Court Judges (June 2003)
30. Submission from Great Sioux Nation ICWA Consortium
31. Tribal Advisory Council's Directory
32. ICWA Commission's Meeting Agenda of December 30, 2004

Chapter I

Executive Summary

REPORT OF THE SOUTH DAKOTA COMMISSION ON THE INDIAN CHILD WELFARE ACT 2004

I. EXECUTIVE SUMMARY

In the 2004 Legislature, the Senate enacted Bill 211 that established the Governor's Commission on the Indian Child Welfare Act (ICWA). The commission was charged to study the requirements of the federal Indian Child Welfare Act (25 U.S.C. Sections 1901-1963) including compliance with the requirements for notice, placement, expert witness testimony, intervention, transfer of jurisdiction, and active efforts, and the means by which Indian tribes can assist in pursuing the policies of the act. The study of the commission included the following areas:

- 1 Review the analysis of ICWA compliance completed by an independent reviewer and based upon the results, identify and prioritize any issues or barriers preventing or hindering compliance;
- 2 Review the efforts of the Department of Social Services to enter into agreements with Indian tribes regarding licensing of foster homes, access to federal funding, and contracting of child protection services;
- 3 Explore and evaluate options to address and resolve identified issues and barriers preventing or hindering compliance; and
- 4 Make recommendations to improve compliance with the federal Indian Child Welfare Act, as amended to January 1, 2004, and identify additional resources needed to implement the recommendations.

The commission was comprised of 29 persons representing the nine American Indian tribes in South Dakota, the Department of Social Services, the Unified Judicial System, the Department of Corrections, members of the Legislature, State's Attorneys, child placement agencies, and Court Appointed Special Advocates (CASA). Additionally, the Governor appointed the National Center for State Courts (NCSC) as independent reviewers, in partnership with North American Indian Legal Services (NAILS), to complete an analysis of

compliance with ICWA. A draft of the reviewers' completed report was presented to the commissioners at their December 14, 2004 meeting.

The commission, at its initial meeting, determined to hold listening sessions on every reservation and in Rapid City and Sioux Falls to give community members the opportunity to describe their experiences and perceptions of the state's compliance with ICWA. Listening sessions were held between September 10 and October 11 with oral and written testimony being presented to the commissioners. Additionally, presentations were given at the regular commission meetings regarding the implementation of ICWA. The collection and analysis of these testimonies and presentations were instrumental in the development of many of the recommendations listed in this report.

The independent Review Team, as part of its assessment, completed forty two-hour focus groups with state stakeholders, held focus group meetings on each of the nine reservations, reviewed 94 separate case files from every judicial circuit, consisting of the actual court file and the DSS files, administered a web-based survey of state and tribal stakeholders, and performed an intensive file review of four cases, including interviews with professionals and others involved in the actual cases. The reviewers presented 34 recommendations to the commission.

During the seven months preceding this report, the commission convened five (5) meetings and communicated consistently using e-mail and regular mail. The commissioners were able to review numerous documents from the federal, state and tribal entities regarding the design and implementation of ICWA, listen to expert witnesses regarding ICWA, analyze and discuss testimonies from various individuals and organizations, and deliberate on the concerns and successes of ICWA compliance. From these discussions the commissioners prioritized all the recommendations made by them and by the reviewers. The commission believes that many of the recommendations made herein can be implemented through the enactment of a state ICWA bill following consultation with all invested stakeholders including the tribes and state agencies. The top 30 recommendations are:

1. Extend the service of the ICWA Commission for one year in order to provide guidance and assist in the implementation of its recommendations.^a

2. DSS should consider hiring “child placement investigators” to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.
3. Create a position for a statewide ICWA Coordinator within DSS to help enforce a statewide ICWA compliance plan (In the Interests of D.M., R.M., III and T.B.C., 2004 WL 1689673 (SD), 2004 SD 90).
4. The Governor of the South Dakota and Department of Social Services through its Secretary should offer to each tribe in South Dakota the opportunity to enter into a contract to enable the tribe to provide full child welfare services to its children domiciled on its reservation, including foster care licensing, Title IV-E payments, and administrative capacity.
5. Encourage the Department of Social Services to work with each tribe to identify qualified expert witnesses whose testimony will be relied upon by state courts and not just utilize those experts who will conform their opinions to the requested actions of DSS. Department of Social Services shall contact tribal community colleges to identify persons who could serve as qualified expert witnesses.
6. Whenever possible, DSS and State’s Attorneys shall provide tribes with notice of 48 hour hearings and the opportunity to participate, by telephone or in person. When the tribe indicates a desire to participate, the Circuit Court shall consider the input of the tribe in determining whether an emergency situation exists; whether a continued out-of-home placement is necessary; and whether extended family members are available to provide care for the child. DSS and the State’s Attorneys shall attempt to introduce qualified expert witness testimony at the 48 hour hearing.
7. Create family placement specialist teams with representatives from the Department of Social Services and each tribe to search for relatives.
8. Proactively recruit American Indian foster homes throughout the state.
9. DSS and the State’s Attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs (BIA). This should include uniform language and format including the right of the parties to review the court files and inclusion of the mother’s maiden name. The same notice should be given to parents and Indian custodians.
10. Revise the format of the PRIDE classes to include culturally appropriate parenting practices. Consider contracting with a tribal community college or colleges to train American Indian foster care providers to expand the pool of providers and make PRIDE classes more culturally appropriate.

- a This recommendation was proposed by members of the Great Sioux Nation delegation in attendance at the December 14 Commission meeting and accepted unanimously by the Commission as a priority.

11. Enter into agreements with each tribe and provide appropriate training so that the tribes may license their own foster homes both on and off the reservations. The Department of Social Services shall honor tribal licenses pursuant to 25 U.S.C. Section 1931(b) and children in homes shall be eligible for all state and federal benefits.
12. All of the state agencies involved in CHINS cases must develop a realistic and consistent protocol for the application of ICWA in CHINS cases. At a minimum, (1) State's Attorneys should include an ICWA statement in the petition and notice the tribes, and (2) judges should make active inquiry and a record (at each stage of the proceeding) whether ICWA is applicable. This information should also be included in the court order. The tribes should develop a consensus regarding how they are to respond to CHINS.
13. Create a statewide ICWA office within state government.
14. Provide tribes before every hearing, if necessary by fax, copies of all DSS reports generated by workers. This includes 48 hour emergency hearings if DSS has determined the tribal affiliation of the child prior to the hearing.
15. The tribes should fully staff and fund ICWA offices, as a top priority, to include paralegals and attorneys. Additionally, the tribes should fully staff and fund the juvenile and family courts on each reservation.
16. DSS should expand family group conferencing to each reservation.
17. Create a brochure to be distributed to families in court explaining the Indian Child Welfare Act and their rights under the Act.
18. Develop a protocol for transfer of cases from state to tribal court including those cases where DSS maintains the child in foster care placement and provides services. DSS shall work with each Indian tribe to apprise them of the options available to DSS and the tribes for paid placements under the Interstate Compact Act for Indian Children transferred from out of state.
19. Increase the resources necessary to quickly and thoroughly complete home studies. Delays hold up kinship placements and jeopardize placement options.
20. The tribes should keep DSS, the South Dakota Attorney General, State's Attorneys and the Circuit Courts regularly apprised of any change in tribal law regarding child protection issues including any tribal resolution or amendments to tribal law changing the order of preference for foster care and adoptive placements for the children of that tribe.
21. All state and private adoption agencies should designate specific local, regional and state-level ICWA employee resources within their organizations. For DSS and UJS,

this may include specifically designated individual(s) within the private agency “network”. This information should be widely disseminated throughout each organization.

22. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e., three completed ICWA cases, advanced training in ICWA, and the knowledge of services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert on their own cases.
23. UJS should also fund a statewide ICWA coordinator to work with the DSS counterpart to serve as a liaison between courts, DSS, and the tribes. Furthermore, this coordinator should work to implement the many recommendations contained in this report.
24. Request the Supreme Court to update the South Dakota Guidelines for Judicial Process for Child Abuse and Neglect Cases (SD Guidelines – “The Green Book”).
25. All judicial circuits should require that an ICWA affidavit or court report be filed in every case involving an Indian child. The ICWA affidavit or court report should be updated at each step of the proceedings in terms of the ongoing need for the child’s placement consistent with ICWA placement preferences.
26. When actions venued in state court, involving children domiciled off the reservation, are transferred to tribal court, DSS, if so ordered by the tribal court, will maintain legal custody, similar to placements by tribal courts with DSS for reservation domiciled children, and the tribal courts shall commit to conducting court proceedings in a manner that accommodates the families of off-reservation children and witnesses. DSS and the tribes that take advantage of this opportunity shall develop procedures for such cases addressing issues such as the applicability of ASFA to such children and other matters.
27. Tribes should respond to DSS contacts either by telephone or in writing to assure regular communications with DSS workers to prevent perception by DSS or state court that the tribe is not desirous of participating in a pending state court proceeding.
28. Certificates of Mailing should clearly indicate which documents were included in the mailing.
29. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian Child. This information should be included for the record of the case and the court order. Moreover, the UJS should consider adopting the standards and practices set out by the National Council of Juvenile and Family Court Judges – Indian Child

Welfare Act Checklists for Juvenile and Family Court Judges (June 2003). These checklists articulate best practice standards for state courts processing of ICWA cases. (Appendix 29)

30. The provision of active efforts can be strengthened by caseworkers becoming more hands on or directly involved in helping clients achieve the goals outlined in the family service and treatment plans. For example, rather than simply giving a mother the telephone number of a program that provides parenting classes and expecting her to set up classes, the caseworker and mother could together visit with a program representative to discuss how the class will meet the needs of the mother and then discuss any barriers, such as transportation, childcare, or work schedule, that might make it difficult for the mother to attend classes.

The ICWA Commission believes it is imperative to understand both the work and recommendations of the Review Team and the work and the recommendations of the commission. In many cases, the recommendations made by both groups were similar. The full Commission Report includes the Review Team's executive summary and their 34 recommendations. Immediately thereafter are the 64 recommendations made by the ICWA Commission. (From the initial list of 75 recommendations, the commissioners found 11 to be duplicative.) It is our view that each of the recommendations made by the ICWA Commission should be given strong consideration and prompt attention by the applicable state stakeholders and the tribes.

In many ways it is unfortunate that this commission was not impaneled 25 years ago to begin the important work of building collaborative relationships between each of the tribes in the state and developing trust between the state and tribal courts. Although the commission has made some recommendations that involve the expenditure of funds, we deem this to be money well spent to provide necessary and improved services to American Indian children. The tribes and the state must develop the political will to enter into full contracts for the provision of child protection services, similar to that in place with the Sisseton-Wahpeton Oyate Tribe since 1978.

The state and the tribes must begin to partner in new and innovative ways to break down barriers and improve services to children. The South Dakota Legislature must be willing to fund additional full-time employees to implement the many recommendations found in this report. The money to provide services to needy children and families will be well spent as it serves as a building block for the future of South Dakota.

The commission has submitted a proposed rule before the South Dakota Supreme Court that would permit tribes to appear through counsel or by a designated representative of the tribe in state court abuse and neglect proceedings. Some state circuit court judges will not permit persons to appear on behalf of a tribe unless they are licensed members of the South Dakota State Bar. As many tribes cannot afford to retain legal counsel to appear on behalf of the tribe in ICWA cases, this prohibition results in a barrier for some tribes to effectively advocate in state court.

The commission was not formally charged by the Legislature with researching the history of state ICWA legislation across the nation and proposing a bill for the 2005 legislative session. Accordingly, the commission focused its efforts on meeting its charge to identify barriers to compliance and to find workable solutions.

The commission sincerely hopes that each of these recommendations will be given careful consideration and implemented in the years ahead. More than 500 people attended the listening sessions and the commission received dozens of written submissions. Compliance with ICWA and service to American Indian children is a vitally important issue. The commission recommends that its life be extended for a period of one year to ensure appropriate follow-up and implementation of the recommendations by the state and tribal stakeholders. It is the sincere

hope of the commission that the tribes and the state agencies will begin to collaborate in a new and effective way to better serve South Dakota's children.

Chapter II

Historical Development of the Indian Child Welfare Act

II. HISTORICAL DEVELOPMENT OF THE INDIAN CHILD WELFARE ACT

American Indian children occupy a unique status in the American and South Dakotan legal system. They are citizens of three separate political entities: the United States, the state of South Dakota, and lastly, the Indian tribe to which they enjoy membership. Because the Indian tribes to which they belong maintain a distinctive political relationship with the United States government Indian children are oftentimes the subject of distinct federal laws that apply exclusively to Indian people. Yet, as South Dakota citizens, they are entitled to the same privileges and protections as non-Indian children under state law, especially with regard to the various programs operated by state and county governments pursuant to federal mandates. When Indian children reside on one of the nine Indian reservations and Indian lands throughout the state, yet another layer of law, tribal law, may determine their rights and obligations.

One of the unique laws that the United States enacted to preserve the rights of Indian children is the Indian Child Welfare Act (hereinafter referred to as ICWA). On November 8, 1978, Congress passed the Indian Child Welfare Act (ICWA) in response to the “rising concern...over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placement” (Mississippi Band of Choctaw Indians v. Holyfield, 1989). By limiting states’ powers over Indian children, ICWA aims to support Indian families, specifically by maintaining Indian children with Indian caregivers, while honoring a rich cultural tradition and tribal sovereignty.

To understand why the United States enacted the Indian Child Welfare Act for the benefit of Indian children and Tribes necessitates an examination of how Indian children and families have been treated by the federal and state governments. By examining this history the reader will

better understand the importance of the law to Indian families and tribes and why implementation is so crucial to the survival of Indian families and tribes. This review will hopefully also lay some historical foundation for the report that follows. Even though the Indian Child Welfare Act has been binding upon state courts in South Dakota and the Department of Social Services since 1978, the numbers of Indian children under DSS custody remain alarmingly high. Many of these children have been placed under the legal custody of the Department of Social Services by actions of Indian tribal courts and the plight of these children was also examined by the Commission when it undertook its examination of the state of the ICWA in South Dakota. South Dakota is unique nationwide because on many of the larger reservations in South Dakota, despite the clear preference in the ICWA for Indian tribes to exercise exclusive jurisdiction over their children living on their reservations, the DSS provides child protection services for a majority of Indian children in need. This has created tensions on some reservations and has led the state DSS and those Tribes to begin discussions about transferring necessary resources to those tribes to enable them to serve their children without state interference. The historical discussion herein will examine why these discussions are necessary and why Indian tribes have not been given the resources to enable them to perform the various functions that the ICWA charges them with.

A. AMERICAN INDIAN CHILDREN AND FEDERAL POLICY

American Indian children have been the legal targets of a multiplicity of notions and ideas promoted by policy makers with conflicting agendas regarding their “best interests”. In the late 1800’s federal policy makers targeted Indian children as the agents of change in an era when Indian people were perceived of as “savages” who needed to be rehabilitated and Christianized

in order to survive in an increasingly dominant non-Indian society.¹ Transforming Indian children was perceived as the key to Indian survival in that dominant society and as a result they were oftentimes removed from their parents and placed in boarding schools where they were denied the right to speak their native languages, practice their spiritual beliefs, or even adhere to their traditional grooming and attire.²

Because they were oftentimes the legal guinea pigs for an assortment of notions regarding the future of Indian tribes and their people, a wealth of unique laws and policies flowered simultaneously with their upbringing. Probably never before in this country has there been such a concerted effort to transform a group of people by legally manipulating their children.³ Contemporary Indian children are the survivors of these policies of cultural degradation. Understanding this history of federal policy toward Indian children is imperative to

¹ As the founder of one of the first boarding schools, Richard Pratt, stated in 1892: "Kill the Indian in him and save the man." (A Bid to Redefine Indian Education, Nov. 27, 1995, New York Times).

² As anthropologist Peter Farb described the boarding school experience: "The children were usually kept at boarding school for eight years during which time they were not permitted to see their parents, relatives or friends. Anything Indian- dress, language, religious practices, even outlook on life...was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes and with their hair cut short and their emotionalism toned down the boarding school graduates were sent out either to make their way in a white world that did not want them or to return to a reservation to which they were now foreign." (P. Farb, 1968, *Man's Rise To Civilization*, pp 257-259, New York: E.P. Dutton & Co. Inc.).

³ One of the best examples is this is the following statement from the Commissioner of Indian Affairs who stated: "It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization... They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man." (See Comm'n Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 50th Cong., 2d Sess., XIX, 1888)

appreciating why a law such as the ICWA exists. Congress, when it enacted the ICWA, recognized that Indian tribes should determine the destiny of their children and has passed several laws designed to protect this tribal prerogative.⁴

Ironically, Indian self-determination has not always been kind to Indian children, however. Tribal self-determination became of vogue in the late 1960's and early 1970's when Congress passed a variety of federal laws that recognized the inherent sovereign rights of Indian nations to determine their own laws and be governed by them. Congress was also turning over federal programs, including social service, education and health programs impacting Indian children, directly to Indian tribes to permit them to operate them. These laws, especially the ones directly benefiting Indian children, undoubtedly promote the best interest of Indian children by permitting Indian tribes to determine the values important to Indian families without interference. However, Indian tribes, despite the consideration paid to them by federal legislators who recognize their sovereign status, have never been treated by the federal government similarly to the other semi-sovereign political entities-state governments. At the same time that Congress was promoting Indian self-determination, it was also crafting the "Great Society", an effort to legislatively provide for the basic needs of all Americans, but especially children, through a system of federal grants to state governments which would be utilized to operate programs to assist children who were deprived of the support of their parents and who needed medical services. Accessing these programs, for Indian children, is just as important as being the beneficiaries of special federal laws designed only for Indian children.⁵

⁴ Examples of these laws include the Indian Child Welfare Act, 25 USC 1901 et seq., the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638), 25 U.S.C. 450a-450n.

⁵ As a general proposition, more Indian children domiciled on Indian reservations rely upon

South Dakota and the Indian tribes in South Dakota must therefore work cooperatively to provide for the welfare of Indian children. Tribes may have jurisdiction over Indian children, but this jurisdiction does not always mean that Tribes can access the necessary funding to provide for their children. This is especially evident in the area of child welfare where the primary funding source to provide for neglected or abused children, Title IV-E of the Social Security Act, is only available to state governments for those children in state or county custody. This is true despite the acknowledgment in the Indian Child Welfare Act, at 25 USC §1931, that Indian children placed by Indian tribes should be entitled to all benefits provided under federal and state law.

B. HISTORY OF INDIAN CHILD WELFARE ACT

This historical legacy of the treatment of Indian families laid the foundation for the passage of the Indian Child Welfare Act. By the spring of 1974, the separation of Indian children from their tribes had become a national “crisis of massive proportion”. As a result, the Senate Subcommittee on Indian Affairs conducted extensive oversight hearings to address the tribes’ concerns about the loss of their children. Those hearings produced overwhelming evidence substantiating the palpable harm inflicted on Indian children, their families and tribes by agency practices. One study, for example, revealed that 25 to 35% of all Indian children had been

programs operated by the states for their subsistence than rely upon tribal programs for their survival. This is largely the result of the legal reality that most of the programs designed to provide for poor children can only be operated by state governments because they are the only legal entities entitled to receive federal dollars to operate such programs. Although this changed somewhat in 1996 with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub L 104-193), which allows Tribes to now operate the TANF and child support enforcement programs, that law fails to appreciate that tribal governments do not have the same resources as states to come up with the necessary fiscal matches to operate those programs.

separated from their families and placed in adoptive families, foster care or institutions. Of those placed in foster or adoptive homes, about 85% were placed with white families.

As reported by the House:

Surveys of states with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.

* * *

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes.

* * *

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.

Subsequent hearings were held in 1977 and 1978 on the bill that became the Indian Child Welfare Act. At these hearings there was considerable focus on the destructive effect on tribes as a result of the “massive removal of their children”. Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen’s Association, spoke on the destructive effect on tribal survival and tribal sovereignty.

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are

to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

This sentiment was echoed on the congressional floor debate on the bill that was to become the ICWA: "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy" (Congressman Udall); and "This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes" (Congressman Lagomarsino).

Indian tribes in South and North Dakota, as well as legislators from South Dakota, were particularly involved in promoting the passage of the Indian Child Welfare Act. From 1969 through 1974, AAIA, acting at the request of the Devil's Lake Sioux Tribe (now known as the Spirit Lake Tribe) and the Sisseton-Wahpeton Oyate, conducted nationwide studies on the impact of state child welfare practices toward American Indian children. AAIA research indicated that 25-35% of all Indian children were placed in either foster homes, adoptive homes, or institutions. The decision to remove these children from their natural families was often a product of state child welfare agents' lack of understanding of American Indian culture and child-rearing practices (Hollinger, 1992; U.S. House Report 1978).

The AAIA study also produced multiple findings which reflected the severity of the problem of Indian children in substitute care. For example, in Minnesota Indian children were five times more likely to be placed in foster care compared to non-Indian children, while in Montana Indian children were 13 times more likely to be placed compared to non-Indian children. In South Dakota, between 1967 and 1974, Indian children were the subject of 40% of the states adoptions, yet Indian children comprised only seven percent of the juvenile population.

Also, foster care placements of Indian children were 16 times that of non-Indian children in South Dakota. Unfortunately, in South Dakota the numbers of Indian children being placed by the State DSS have not decreased that dramatically (Indian persons represent 8% of the population, yet represent over 60% of children in DSS custody). In Washington, the adoption rate of Indian children was 19 times that of non-Indians, while the foster care placement was ten times that of non-Indian children.

A survey of 16 states in 1969 also revealed that approximately 85% of Indian children in foster homes and 90% of non-relative Indian adoptees were living with non-Indian families (U.S. House Report, 1978). The results of this survey troubled tribes for a variety of reasons. First, the placement of so many Indian children in non-Indian homes threatened the extinction of the tribes. In short, tribes were losing the most basic necessity for survival—a next generation. Second, the alienation of Indian children from their unique tribal cultures and values resulted in the development of maladaptive behaviors such as antisocial behavior, depression and suicide among alarming numbers of Indian children, as reflected in the 1974 AAIA report.

In 1974 Congress initiated its first hearing on the state of Indian children in substitute care. During testimony before the subcommittee, William Byler, then executive director of AAIA, commented on the statistical evidence uncovered by AAIA, stating the comparatively high rate of outplacement for Indian children was “the most tragic aspect of Indian life today” (S. Rep. No. 597, 95th Cong., 1st Sess. 11 (1977)).

The testimony in 1974 also provided the first official acknowledgement by the United States government that the unwarranted removal of Indian children from their families represented a systematic attempt to destroy native tribes and cultures that resulted in negative outcomes for both tribes and tribal children. In his opening statement, South Dakota Senator

Abourezk, the chairman of the subcommittee, noted that the placement of “Indian children in non-Indian settings” resulted in “their Indian culture, their Indian traditions, and, in general, their entire way of life...being smothered” (93rd Cong. 2d Sess. 1, 3 (1974)). Sen. Abourezk continued by declaring that this loss “strike[s] at the heart of Indian communities” and had been called “cultural genocide” (93rd Cong. 2d Sess. 1, 3 (1974)).

Four years later, ICWA was signed into law and is regarded as the most significant piece of legislation affecting American Indian families passed by the United States Congress (Plantz et al., 1989). The Act states:

There is no resource that is more vital to the continued existence And integrity of American Indian tribes that their children...and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions. The states... have often failed to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families. It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families... (ICWA of 1978, 25 U.S.C. Sec.1901, 1902).

The ICWA establishes minimum federal jurisdictional, procedural and substantive standards aimed to achieve a dual purpose: (1) to protect Indian children and families; and (2) to stabilize and foster tribal existence. The discussion that follows will provide a broad overview of the Indian Child Welfare Act and discuss developments in the implementation of the Indian Child Welfare Act since its enactment.

There are both procedural and substantive provisions of the Indian Child Welfare Act. Both are designed to accomplish three primary objectives: 1) to eliminate the need to remove Indian children from their families, both nuclear and extended, because of cultural bias and ignorance; 2) to assure that Indian children that need to be removed for their own protection be placed in foster and adoptive homes that reflect their unique cultures and background; and 3) to

encourage tribal court adjudication of child custody proceedings involving Indian children.

The ICWA applies to state court “child custody proceedings” involving “Indian children”. A child custody proceeding under the Indian Child Welfare Act is defined as a foster care placement, termination of parental rights proceeding, preadoptive placement or adoptive placement of an Indian child. The ICWA does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding, nor does it apply to delinquency proceedings involving Indian children who commit acts that would be criminal if committed by an adult. It is important to note that the child custody proceeding need not involve some state action, such as the removal of an Indian child by a state or county child protection entity, in order for ICWA to apply. The ICWA applies to private placements and adoptions as well as those initiated by state and county agencies.

An “Indian child” is defined under the federal law as an unmarried child under eighteen who is a member of a federally-recognized Indian tribe or eligible for membership in a federally recognized Tribe and the natural child of a member of an Indian tribe. Indian tribes, under the ICWA, are given the right to determine their own membership and a state court must defer to a tribal determination of membership. In any child custody proceeding in state court where a party believes or has reason to believe that the child involved is an Indian child there is an affirmative obligation on the part of all parties, and their attorneys, to report such to the court so that notice may be given to the Indian child’s tribe. Some courts have carved out an exception to the definition of Indian child, commonly referred to as the “existing Indian family exception”, and held that the Act should not apply to an otherwise qualified Indian child who has not lived with an Indian family or with an Indian family with few or no ties to an Indian tribe. The language of the Act does not support such an exception, but these courts have asserted that such an exception

is consistent with the legislative history of the Act. Other courts and commentators have strongly criticized this exception and some state legislatures have taken action to repeal the judicially created exception. The South Dakota Supreme Court seemed to reject this exception in *Matter of Adoption of Baade* (462 NW2d 485 (SD 1990)).

The procedural requirements of the Indian Child Welfare Act are contained generally at 25 U.S.C. 1911 and 1912. 1911 distinguishes between the jurisdiction of state and tribal courts in child custody proceedings involving Indian children. Indian tribal courts are given exclusive jurisdiction over child custody proceedings involving Indian children domiciled on Indian reservations or who are wards of tribal courts. This rule applies in all states, except states commonly referred to as Public Law 280 states which were given civil jurisdiction over Indian reservations. In those states, the state courts may exercise concurrent jurisdiction, along with tribal courts, over child custody proceedings involving Indian children. For Indian children domiciled off reservations, state courts can exercise jurisdiction over child custody proceedings but the exercise of that jurisdiction is subject to a transfer of jurisdiction to the tribal court of the Indian child's tribe. In general, the ICWA favors a transfer of jurisdiction of a child custody proceeding involving an Indian child to a tribal court unless certain findings are made by the state court judge. The parent of an Indian child can always veto a transfer to a tribal court, as can the tribal court decline a transfer of jurisdiction to its court. Many Tribes do not transfer jurisdiction over the majority of child custody proceedings involving their children, many times because they lack the financial resources to provide for the children that the State may be able to access.

Notice is a vital component of the Indian Child Welfare Act. The act requires any party to an involuntary child custody proceeding involving an Indian child to give notice to the child's

parents, Indian custodian (if one exists), and to the Indian child's tribe of the commencement of the proceeding. Notice is triggered by any suggestion that the child is an Indian child and any tribe with possible affiliation must be given notice. Most courts have ruled that the failure to give notice under the Act deprives the state court of jurisdiction. In many cases, more than one tribe must be given notice because of differing tribal affiliations among the parents. If a party cannot determine which tribe the child is affiliated with, notice may be given to the Bureau of Indian Affairs which is then charged with the responsibility to determine tribal affiliation.

Other procedural requirements of ICWA govern the weight of the evidence and type of evidence necessary to sustain an involuntary foster care placement or involuntary termination of parental rights. In order to achieve an involuntary placement of an Indian child outside of his home, the party seeking removal must establish by clear and convincing evidence, supported by the testimony of a qualified expert witness, that the child would suffer severe emotional or physical harm if left in the child's home. The moving party must also establish that active remedial and rehabilitative services were offered to the family to attempt to avoid removal. To sustain a termination of parental rights, the court must find beyond a reasonable doubt that these requirements are shown. The requirement that a qualified expert witness' testimony support removal or termination is an attempt by Congress to assure that a person with specific knowledge of Indian child-rearing practices testifies to the cultural propriety of removal or termination. In general, a qualified expert witness is either a person with specialized knowledge of Indian cultural practices regarding child rearing or a person with professional knowledge which can aid the court in deciding a child custody matter. The need to demonstrate that active remedial and rehabilitative services are provided Indian families is similar to the requirement found elsewhere in federal law, except under ICWA those services have to be provided before

removal is effected as well as afterwards in an attempt to seek family reunification.

Indian parents and custodians are also entitled to the appointment of counsel in ICWA cases, notwithstanding their need. If a state would otherwise not appoint counsel in a particular matter but does because of the mandate of ICWA, that state can apply to the BIA for reimbursement for the expenses of court-appointed counsel.

The Indian Child Welfare Act recognizes that Indian tribes have unique rights which must be preserved in litigation regarding the placement of their children. To protect these rights, the Act gives an Indian tribe the right to intervene at any stage of an ICWA proceeding and also vests in the tribe the right to request a transfer of the proceeding to a tribal court. Tribes are also given additional time to prepare for litigation after notice is provided and they also have a fairly unlimited right of discovery in ICWA cases. Lastly, Indian tribes are given an independent right to discover the placement location of their tribal members and are also given the right to collaterally challenge actions taken by state courts and entities in violation of the Indian Child Welfare Act.

The substantive provisions of the ICWA are the placement preference provisions contained at 25 U.S.C. 1915. These provisions are designed to assure that Indian children that are removed from their homes be placed in homes that reflect their unique cultures. There are separate placement preference provisions governing foster care and adoptive placement preferences. Both recognize that Indian tribes should have the right to alter the placement preferences by enacting their own preferences for placement of their children. Absent that, state courts are directed to place Indian children first with their extended families (which in the case of a child of both Indian and non-Indian parents would include the non-Indian family members), second with a home licensed by the Tribe, third with a member of the child's tribe, fourth with

another Indian family and as a last resort with a non-Indian family. Despite this mandate of ICWA, many Indian children continue to be placed predominately with non-Indian foster families, primarily due to the failure of some states to recruit sufficient Indian foster families.

The Indian Child Welfare Act has, as one of its primary objectives, eliminating the removal of Indian children from their families and tribes based upon cultural bias or ignorance. Over twenty years after that law's enactment, Indian children have not seen a substantial decrease in the incidence of their removal from their families. In 1996, more than half a million children were in state-run foster care.⁶ Indian children are significantly over-represented in foster care,⁷ with an Indian child three times more likely to be placed in foster care or substitute care than any other child in the general population. In some states that number is as high as sixteen times more likely.⁸ Indian children may be in foster care under the legal custody of state or county governments, tribal governments, or under the legal control of the Bureau of Indian Affairs. Although Indian tribes have been able to tap into alternative sources of funding to pay for foster care since the enactment of the Indian Child Welfare Act,⁹ Title IV-E of the Social

⁶ Craig, Conna and Herbert, Derek (August 1997), *The State of the Children; An Examination of Government-run Foster Care*, NCPA Policy Report Nw. 210, ISBNAN #1-56808-07904, Institute for Children.

⁷ *Opportunities For ACF To Improve Child Welfare Services and Protections for Native American Children*, Department of Health and Human Services, Office of Inspector General, August 1994.

⁸ *Opportunities For ACF To Improve Child Welfare Services and Protections for Native American Children*, Department of Health and Human Services, Office of Inspector General, August 1994.

⁹ Those alternate resources include Title II of the Indian Child Welfare Act, 25 USC 1931-1932, which allows for funding for Indian tribes for the operation of child welfare programs and the application of tribal codes; and Title IV-B of the Social Security Act, 42 USC 628, which authorizes direct grants to Indian tribes for the delivery of child welfare services.

Security Act remains the primary basis for the payment of foster care subsidies for Indian children in substitute care. Unfortunately, despite recent efforts to amend federal law Indian children remain ineligible for Title IV-E foster care payments unless they are placed by a state court in substitute care or by a tribal court on a reservation which has a Title IV-E cooperative agreement with the state wherein that tribe is located.¹⁰

This deficiency inhibits the effective implementation of the Indian Child Welfare Act because Indian tribes are strapped for the resources necessary for them to provide for their children when they are being removed from their families. As a result, many Indian tribes cannot transfer jurisdiction over their children back to their tribal courts simply because they lack the financial wherewithal to provide foster care subsidies for those children and to provide necessary services for them. Even for children on certain Indian reservations where state courts lack jurisdiction, many Indian tribes, including several in South Dakota, have resorted to requesting state and county assistance in providing child protection services in order to access Title IV-E resources and services for those children.

¹⁰ Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985), cert denied 475 U.S. 1121 (1986).

Chapter III

Overview of Title IV-E and The Adoptions & Safe Families Act

III OVERVIEW OF TITLE IV-E AND THE ADOPTION AND SAFE FAMILIES ACT

The biggest obstacle to Indian tribes fully implementing ICWA is their inability to access necessary funding and services. Title IV-E of the Social Security Act is a federal matching grant program designed to reimburse states for foster care, adoption assistance, and transitional independent living program payments. The number of children in foster care has increased 65% over the past ten years.¹¹ To address the steadily increasing foster care caseload, Congress recently passed the Adoption and Safe Families Act (hereinafter referred to as ASFA) of 1997.¹² Accessing Title IV-E funds depends, in part, on whether tribes and states comply with the requirements of ASFA.

ASFA was aimed at improving the safety of children and promoting adoption or some other type of permanency for children in long-term foster care. ASFA mandates the timely placement of children in permanent homes. States are free to adopt more restrictive time restraints, but at a minimum ASFA requires that any child who has been in foster care for 15 out of the most recent 22 months be reviewed for termination of parental rights and freed for adoption. ASFA computes the child foster care entry date based on the date the court finds the child neglected or abused or 60 days after the child's actual removal from the home, whichever is earlier.

ASFA contains a requirement that the state make reasonable efforts to prevent the need for removal of the child or reasonable efforts to reunify the family. However, ASFA also provides that, under certain circumstances, the state is not required to make reasonable efforts to

¹¹ Craig, Conna and Herbert, Derek (August 1997), *The State of the Children; An Examination of Government-run Foster Care*, NCPA Policy Report Nw. 210, ISBNAN #1-56808-07904, Institute for Children.

¹² PL 105-89, Codified at 42 USCA Section 671 et seq (1998).

reunite a child with her/her parents. Such circumstances include where the parent has committed murder, voluntary manslaughter, or felony assault, where the parental rights of the parent to a sibling have been involuntarily terminated, and where the parent has subjected the child to “aggravated circumstances” under South Dakota law as set forth in SDCL § 36-8A-21.1.

While ASFA contains some exceptions to the reasonable efforts requirement, ICWA does not provide for any exceptions to the requirement that the state provide active efforts to reunify the family. Thus, the ICWA active efforts requirements in some cases may conflict with the termination of reasonable efforts mandated by ASFA.

The South Dakota Supreme Court is presently being called upon to resolve this conflict in a pending appeal. The argument in favor of the position that ICWA “trumps” ASFA is based, in part on the absence of any provision in ASFA indicating an intent to modify ICWA. In that regard, although commentary by Administration for Children and Families in promulgating regulations to implement AFSA suggests that it does not intend to supersede the various provisions of ICWA, AFSA itself provides no guidance on how to reconcile its provisions and those provisions in ICWA that seem to conflict. Advocates for the argument that ICWA “trumps” ASFA also rely on the principle of statutory construction that the more specific statute should prevail, arguing that, because ICWA applies only to American Indian children, it is the more specific of the two acts and should prevail.

Conversely, advocates in favor of the argument that ASFA “trumps” ICWA rely on the principle of statutory construction that provides that when two statutes conflict the statute that was enacted last in time prevails. Under this argument, as ASFA was enacted almost 20 years after ICWA, it should prevail over ICWA. Further, had Congress intended otherwise, it would have said so. Such advocates also contend that, by allowing the court to relieve the state from

providing reasonable and active efforts to reunite the child with a parent when, based upon the parent's prior conduct, "aggravated circumstances" exist, the health and safety of every child is made paramount regardless of the child's race – a result which they contend is consistent with both ASFA and ICWA. Finally, the ASFA advocates argue that a finding that ASFA supercedes ICWA does not diminish the effectiveness of ICWA because, although the State could be relieved from providing efforts to reunify the child with the offending parent, the state would not be relieved from complying with other provisions of ICWA.

Attorneys representing Indian parents, Indian children, and Indian tribes should be critically aware of ICWA mandates regarding active efforts and should insist that the active effort requirement set forth in ICWA be adhered to by the state. The burden is on the state to demonstrate that active efforts were made but have proven unsuccessful in keeping the family together. Further, Indian parents and children are entitled to all the protections of ICWA, including the requirement of active efforts, unless the state court finds that "aggravated circumstances" exist and relieves the state from providing active and reasonable efforts to reunify the family based upon the court's conclusion that ASFA "trumps" ICWA – an issue for which the Supreme Court of South Dakota may soon provide much needed guidance.

Accessing Title IV-E funds is one of the most critical steps a tribe can take in preserving sparse tribal social services foster care funds. Title IV-E money is of paramount importance to a tribe because the federal government reimburses a large portion of the foster care expenses. This approach allows a tribe to preserve the Bureau of Indian Affairs foster care dollars and tribal monies for those foster care placements that are not eligible for IV-E funding. The tribe will then be able to provide foster care services to more needy Indian children in Indian Country. Further, children who receive IV-E foster care funding are also eligible for Medical Assistance

under Title XIX of the Social Security Act that will pay for the child's various health care needs. Indian children that are not Title IV-E eligible are not automatically eligible for Title XIX benefits and may be forced to rely upon Indian Health Services and its contract health program. Any foster child that was placed by a tribal court and who resided within an Indian Health Service delivery area at the time of placement remains eligible for health services through the Indian Health Service notwithstanding the placement off a reservation.

In general, an Indian child residing outside of Indian Country, or an Indian child residing within Indian country and who is placed in the legal custody of a state or county child protection program, is eligible for Title IV-E funding if at the time of removal, the child's family was eligible for Temporary Assistance for Need Families (TANF), formerly known as Aid to Families with Dependant Children (AFDC) or if the child was eligible for Supplemental Security Income (SSI). Indian children, both those residing outside Indian country and within Indian country, are considered citizens of the state in which they are residing for purposes of gaining entitlement to the various programs of the Social Security Act, including Title IV-E. Federal law requires that each state which receives Title IV-E funds must provide child welfare services to all eligible children including Indian children who reside in the state.¹³ Furthermore, the Administration for Children and Families (hereinafter ACF), the agency which funds state and some tribal child welfare programs under the various titles of the Social Security Act, expects states to coordinate with tribes for the provision of services and protections to tribal children who are in state or county custody.¹⁴ Failure to confer could result in the termination of benefits

¹³ P.L. 96-272; see also Department of Health and Human Services, Office of Inspector General, Opportunities for ACF to Improve Child Welfare Services and Protections For Native American Children., June Gibbs Brown, Inspector General, August 1994.

¹⁴ Department of Health and Human Services, Office of Inspector General, Opportunities for

under Title IV-B of the Social Security Act.

The problem regarding Indian children domiciled on Indian reservations accessing Title IV-E resources is not that they are ineligible for such services under federal law, but that they can only access those resources through the intercession of state courts or state child protection programs. An Indian child placed in the custody of a tribal child protection program by a tribal court is not, ipso facto, eligible for Title IV-E foster care subsidies, notwithstanding his family's eligibility for TANF prior to his removal. This is because Congress, when it enacted Title IV-E, conditioned eligibility for foster care subsidies and other programs under Title IV-E on the child being placed in the custody and control of a state or county government, with no mention of tribal child welfare programs. On Indian reservations, primarily due to the enactment of the Indian Child Welfare Act and the recognition by the courts that Indian tribes retain the inherent rights to apply their own laws to Indian children free of interference from state laws and entities, Indian tribes have the primary responsibility for protecting the welfare of Indian children. Tribes may be reluctant to place their children in state or county custody because of the abuses documented by Congress when it enacted the Indian Child Welfare Act. In addition, state or county child protection programs may balk at honoring tribal court orders placing Indian children in their legal custody because they are bound by certain federal regulations, which require the cooperation of the courts that place them. Tribal laws may not mirror these federal requirements and these agencies may feel that they cannot comply with federal regulations when they are subject to the inconsistent dictates of tribal court orders.

The irony in this apparent congressional oversight, in assuring the eligibility of Indian

ACF to Improve Child Welfare Services and Protections For Native American Children., June Gibbs Brown, Inspector General, August 1994

children placed by tribal courts for Title IV-E benefits, is that Congress in the Indian Child Welfare Act apparently addressed this issue by assuring tribes that for the purpose of determining eligibility for federal assistance a tribal foster care license should be the equivalent of a state or county foster care license.¹⁵ Theoretically, therefore, ICWA dictates that an Indian child placed in tribally-licensed home should be eligible for Title IV-E and the corresponding Title XIX medical assistance programs and Title IV-D child support enforcement programs.

A. COOPERATIVE AGREEMENTS

Tribes are mandated to enter into cooperative agreements with the state in which the tribe is located in order for the Indian children residing in Indian Country to receive Title IV-E funding. Congressional legislation neither requires nor encourages states to share Title IV-E funds with tribes. Federal legislation has been introduced to allow eligible Indian Children placed by a tribal court to receive Title IV-E benefits, but heretofore that legislation proved unsuccessful. Many of these issues will remain unresolved unless legislation is passed which allows tribes to receive Title IV-E funding directly. However, until such legislation is passed, tribes and states must work together to ensure that Indian Children who reside in Indian Country receive Title IV-E foster care funding.

¹⁵ 25 USC 1931(b).

Chapter IV

Summary of South Dakota Supreme Court Decisions Interpreting ICWA

IV. SUMMARY OF SOUTH DAKOTA SUPREME COURT DECISIONS INTERPRETING ICWA

The Supreme Court of South Dakota has issued more than 30 opinions addressing the application and interpretation of ICWA since passage of the Act in 1978.¹⁶ A complete listing of the opinions is included as Appendix 1 along with a copy of the Act. A summary of the more significant opinions by various subject areas follows.

In one of the first cases addressing ICWA, the Supreme Court upheld the constitutionality of the Act. Matter Guardianship of D.L.L., 291 N.W.2d 278 (SD 1980). The court rejected arguments that the Act unconstitutionally infringed upon the states' jurisdiction over domestic relations cases or that the denial of access to state court constituted "invidious racial discrimination". According to the court, "There can be no greater threat to essential tribal relations and to the tribal power of self-government than to interfere in questions of custody of tribal members."

In an opinion issued the following year, the Supreme Court emphasized the importance of complying with the Act whenever the child is an "Indian child" as defined by the Act.¹⁷ People in Interest of C.R.M., 307 N.W.2d 131 (SD 1981). Noting that, despite the mother's assertion that ICWA applied, the trial court had failed to enter a finding as to whether the child

¹⁶ Because the Supreme Court does not issue a written opinion in every appeal, the actual number of appeals involving ICWA exceeds 30.

¹⁷ Several other states have adopted the "existing Indian family doctrine" which requires that, before ICWA is applied, significant Indian cultural ties must be shown to exist between the family and the Indian tribe. The Supreme Court of South Dakota initially embraced the doctrine in Claymore v. Serr, 405 N.W.2d 650 (SD 1987). However, the Court later rejected the doctrine by holding that it is incorrect, when determining whether the Act applies, to focus *only* upon the interests of an existing Indian family. Matter of Adoption of Baade, 462 N.W.2d 485 (SD 1990). See also: In re N.S., 474 N.W.2d 96 (SD 1991).

was an “Indian child”, the Supreme Court remanded the case for the purpose of making the determination whether the child was an “Indian child”. Further, the court warned that failure to comply with the Act, if applicable, would leave the trial court without jurisdiction to proceed. See also: Interest of C.H., 510 N.W.2d 119 (SD 1993). However, the court later held that the party who claims that ICWA applies has the burden of proof of showing that the child meets the definition of an “Indian child”. In re A.S., 2000 SD 94, 614 N.W.2d 383; People ex rel D.T., 2003 SD 88, 667 N.W.2d 694. Absent proof that the child is an “Indian child”, the trial court is not required to apply ICWA. Matter of B.R.B., 381 N.W.2d 283 (SD 1986).

Likewise, the Supreme Court recognized the importance of providing notice to the child’s Indian Tribe and held that the failure to provide adequate notice to the Tribe deprives the trial court of jurisdiction to terminate the parental rights of the child’s parents. Matter of N.A.H., 418 N.W.2d 310 (SD 1988). According to the court, at a minimum, the notice must conform to the standards found in § 1912(a) of the Act. The better practice would be to follow the Bureau of Indian Affairs Guidelines (the “BIA Guidelines”) regarding notice.¹⁸

However, the Supreme Court has also held that, in some circumstances, “substantial compliance” with the notice requirements is sufficient. For example, service of the notice by certified mail, rather than registered mail, was found to be “substantial compliance” with the act and sufficient to put the recipient tribe on notice of the pending proceedings and its right to intervene in Matter of S.Z., 325 N.W.2d 53 (SD 1982). In addition, the court has allowed less-than strict compliance with the notice requirements if the Tribe received actual notice of the hearing. Matter of B.J.E., 422 N.W.2d 597 (SD 1988); In re A.L., 442 N.W.2d 233 (SD 1989).

¹⁸ Although the Supreme Court suggested that the BIA Guidelines should be followed, the court has also recognized that the BIA guidelines are only guidelines: they are interpretive in nature and do not have binding legislative effect. Matter of J.L.H., 299 N.W.2d 812 (SD 1980); In re S.D., 402 N.W.2d 346 (SD 1987); In re A.L., 442 N.W.2d 233 (SD 1989).

The court has also indicated that notice by registered mail may not be required for every hearing during the case if the Tribe received actual notice of the hearing. In re D.M., 2004 SD 90, 685 N.W.2d 768 (following remand).

The date the Indian tribe received notice is significant in cases involving motions to transfer jurisdiction under § 1911(b) of the Act. In that regard, the Supreme Court has upheld the trial court's determination that "good cause" existed for the denial of a motion to transfer where the motion was not filed promptly after receipt of notice by the tribe and was filed at an advanced stage of the proceedings. In re A.L., 442 N.W.2d 233 (SD 1989) (motion filed almost twelve months after receipt of notice held untimely); People In re S.G.V.E., 2001 SD 105, 634 N.W.2d 88 (motion filed 14 months after receipt of notice and 2 months after termination of parental rights held untimely); In re D.M., 2004 SD 90, 685 N.W.2d 768 (following remand)(motion filed 11 months after receipt of notice and after dispositional hearing had commenced held untimely).

In an opinion discussing various criteria for a finding of "good cause", the court in In re J.J., 454 N.W.2d 317 (SD 1990) held that consideration may be given to a child's "best interests" when assessing whether "good cause" exists for denial of a motion to transfer. The court found that, under the circumstances in J.J., a transfer of the case would have been very disruptive and detrimental to the well being of the children involved. In addition, although the tribe was an "unwitting pawn" in the plan, the motion had come about due to the attempts by the children's grandmother to manipulate the system.

Although it has recognized that consideration may be given to the child's best interests, the Supreme Court has also placed limits on the weight that may be given various factors in determining the child's best interests. In an opinion issued in 2002, that upheld a transfer of

jurisdiction to the tribal court, the Supreme Court made clear that the mere fact that a substitute parent might provide a child with better care than its natural parent is not an appropriate standard for determining the best interests of the child. In re J.L., 2002 SD 144, 654 N.W.2d 786. See also: In re Guardianship of J.C.D., 2004 SD 96, 686 N.W.2d 647. Further, the court in J.L. also recognized that, because concerns regarding the bond between the child and the foster parents exist in every abuse and neglect case, such concerns cannot be the sole basis for determining the child's best interests. On the other hand, consideration may be given to the likelihood that the transfer of the case would result in further instability or delay.

The Supreme Court has also addressed a parent's right to object to a transfer of jurisdiction to a tribal court under the concurrent jurisdiction provision of the Act, § 1911(b). In that regard, the court has held that a parent's timely objection to a motion to transfer remains in effect and prohibits transfer of the case after the parent's parental rights are terminated – even if the parent later changes his/her mind. Matter of S.Z., 325 N.W.2d 53 (SD 1982); People ex rel K.D., 2001 SD 77, 630 N.W.2d 492. The foregoing principle was cited by the Supreme Court in the recent case of People ex rel D.G., in which the court affirmed the decision of the trial court to vacate the order voluntarily terminating the mother's parental rights, thereby allowing her to object to a motion to transfer, where, at the time of the voluntary termination, the mother was under the mistaken belief that the father was not a member of, or eligible for enrollment in, the tribe and, as a result, mistakenly believed the tribe could not seek transfer of the case People ex rel D.G., 2004 SD 54, 679 N.W.2d 497.

Although the majority of cases addressing transfer issues involve motions to transfer under § 1911(b), the Supreme Court has also addressed the exclusive jurisdiction provision, § 1911(a). The Court first addressed the meaning of “domicile” and “ward of a tribal court” in

Matter of Guardianship of D.L.L., 291 N.W.2d 278 (SD 1980). The court held that, because the tribal court order was of a continuing nature and not final when issued, the child was a ward of the tribal court regardless whether the tribal court order used the words “ward of the court”. In addition, the child’s domicile was that of the parents until legally changed. As a result, the tribal court had exclusive jurisdiction over the case.

The court provided further guidance regarding the criteria for exclusive jurisdiction in two later cases, People in Interest of G.R.F., 1997 SD 112, 569 N.W.2d 29, and People in re S.G.V.E., 2001 SD 105, 634 N.W.2d 88. Regarding domicile, the court held that, for jurisdictional purposes, domicile is determined at the time the proceedings are initiated, i.e., when the temporary custody order is entered or the abuse and neglect petition is filed, and is determined by physical presence in a place with the intent to remain there. In S.G.V.E., the mother moved off the reservation to Rapid City where she and the children were living at the time the action was commenced. Further, the mother had not indicated, by her actions or statements, any intent to return to her reservation residence. Consequently, the domicile of the mother and of the children had changed from the reservation to Rapid City. In addition, the children were not wards of the tribal court as the tribal court had entered a final order which returned custody of the children to the mother and ordered that the case was closed. As a result, the tribal court did not have exclusive jurisdiction over the proceedings.

A final area of frequent discussion in opinions of the South Dakota Supreme Court is the additional criteria for termination of parental rights required under §1912 of the Act, including the standard of proof and the necessity of expert witness testimony. Beginning with the case of People in Interest of S.R., the court held that the “clear and convincing” standard of proof applies during the adjudicatory hearing for cases subject to ICWA. People in Interest of S.R.,

323 N.W.2d 885 (SD 1982). Further, although ICWA only specifies that the higher “beyond a reasonable doubt” standard must be applied during a termination hearing to prove serious emotional or physical harm under § 1912(f), the court held that the standard also applies to the active efforts requirement of § 1912(d): hence, the party seeking termination must prove the ICWA criteria by evidence beyond a reasonable doubt. However, the court held that criteria set forth in state law, but not in ICWA, are not subject to the beyond a reasonable doubt standard. For example, the least restrictive alternative criteria, a requirement under state law, need only be proved by clear and convincing evidence. See also: In re N.S., 474 N.W.2d 96 (SD 1991).¹⁹

Several opinions have addressed the requirement of expert witness testimony under section 1912(f) of the Act. In short, the Supreme Court has consistently held that the qualification of expert witnesses, including ICWA expert witnesses, is within the discretion of the trial court and will be overturned only on grounds of a clear abuse of discretion. Matter of J.L.H., 316 N.W.2d 650 (SD 1982); Matter of K.A.B.E., 325 N.W.2d 840 (SD 1982). Further, the court has noted that the BIA Guidelines contain only suggestions or recommendations as to appropriate qualifications. In re S.D., 402 N.W.2d 346 (SD 1987). As a result, the Supreme Court has, on numerous occasions, upheld the trial court’s determination that a social worker was qualified to provide expert testimony for purposes of proceedings subject to ICWA, particularly where the worker has had experience with Indian families and has received ICWA training. Matter of J.L.H., 316 N.W.2d 650 (SD 1982); Matter of K.A.B.E., 325 N.W.2d 840 (SD 1982); In re D.M., 2003 SD 49, 661 N.W.2d 768 (reh’g granted).

¹⁹ Although the Supreme Court upheld the application of the beyond a reasonable doubt standard to the least restrictive alternative test in a later opinion, it did not state that the higher standard is required. People in re S.G.V.E., 2001 SD 105, 634 N.W.2d 88.

Although ICWA has been in effect for more than 26 years, many issues still exist regarding its interpretation and application. Case law regarding the Act continues to develop as the Supreme Court issues new decisions. As previously mentioned, the Supreme Court is currently considering a case involving the conflict between ICWA and the Adoption and Safe Families Act (ASFA), as to the requirement of active efforts. The Supreme Court is also considering a case involving issues regarding qualifications of expert witnesses. The decisions which will be issued in these cases and others are likely to provide further guidance in this developing area of law.

Despite the opinions of the Supreme Court addressing the issues, many of the issues continue to be points of conflict between the states and the tribes. Critics contend that the opinions are not consistent with the spirit and intent of ICWA. Several of the recommendations made by the commission may assist in resolving such areas of conflict.

Chapter V

Role & Work of the ICWA Commission

V. ROLE AND WORK OF THE ICWA COMMISSION

A. SENATE BILL 211

Senate Bill 211 was originally introduced into the 2004 Legislature by Senator Michael LaPointe and 25 co-signers. The bill, modeled after legislation passed in Iowa and a number of other states, proposed to codify in state law the provisions of the federal Indian Child Welfare Act, (25 U.S.C. §§ 1901-1963) and in addition, to create an expansive set of protections and requirements to govern cases involving Indian children.

The original bill was replaced by a Hoghouse Amendment, which created a commission charged with studying the State's level of compliance with the federal Indian Child Welfare Act. The bill was signed into law by Governor Rounds on March 3, 2004. (See Appendix 2.)

The commission was comprised of 29 members, the composition of which was designated by statute, to wit: The Governor appointed 18 members, including a representative of each of the nine Indian tribes, upon the written recommendation of the tribal chairman, a representative from the Court Appointed Special Advocates program, two representatives of private child placement agencies, four representatives from the Department of Social Services, and two representatives from the Department of Corrections. The President of the Senate appointed two members, including one from each political party. The Chief Justice of the Supreme Court of the State of South Dakota appointed five members, with the South Dakota State's Attorney's Association appointing two members. (See Appendix 3.) The commission was charged with meeting not less than four times and was to dissolve on December 31, 2004.

The bill provided that the Governor would appoint an independent reviewer to complete an analysis of compliance with the Act by the Department of Social Services (DSS), the state's

attorneys, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which Indian tribes can assist the state and private agencies in achieving compliance. Upon completion, the reviewers would submit their report to the Commission.

The duties of the ICWA Commission were specifically set forth by statute, to wit:

1. The commission was charged with reviewing the analysis of compliance, completed by the independent review team and identifying and prioritizing any issues or barriers preventing or hindering compliance;
2. Review the efforts of DSS to enter into agreements with Indian tribes regarding licensing of foster homes, access to federal funding and contracting of child protection services;
3. Explore and evaluate options to address and resolve identified issues and barriers preventing or hindering compliance; and
4. Make recommendations to improve compliance with the federal Indian Child Welfare Act and to identify additional resources needed to implement the recommendations.

B. FORMATION AND FIRST MEETING OF THE ICWA COMMISSION

In April, the Governor's Office selected the National Center for State Courts (NCSC), a non-profit court services organization in partnership with the North American Indian Legal Services (NAILS), a non-profit tribal services organization, to conduct the independent review mandated by statute. The ICWA Commission was ably staffed by Roger Campbell, Tribal Government Relations Director, and his executive assistant, Aske Whitebird. In early May, the appointments to the commission were completed and the first meeting of the ICWA Commission was held on May 25, 2004, in Pierre, South Dakota. All 29 members of the commission were present. The Honorable Janine M. Kern, Circuit Court Judge of the Seventh Judicial Circuit, and

the Honorable B.J. Jones, Tribal Court Judge for the Sisseton-Wahpeton Oyate Tribe, were appointed by the Governor to serve as co-chairs of the commission.

At the initial meeting, the commission members were presented with binders containing the Indian Child Welfare Act, the BIA Guidelines and a summary of the agreements that are currently in place between the State and South Dakota Tribes. The commission also received a presentation from Dawn Marie Rubio, of the National Center for State Courts (NCSC), and Brenda Bellonger, of the North American Indian Legal Services, Inc. The review team presented their time line for the assessment of the State's compliance with the Act, and their data collection methods, which included the following project tasks: 1) state agency focus groups; 2) tribal focus groups; 3) a file review, consisting of an analysis of Unified Judicial System (UJS) and Child Protection Services (CPS) files; 4) a web-based survey of state stakeholders; 5) a web-based survey of tribal stakeholders; and 6) an intensive review of four UJS and DSS court files, to include interviews with professionals involved in the cases.

As of May 25, 2004, approximately 750 Indian children were placed in foster care with 374 children placed by the state court and 376 by the tribal courts. A discussion ensued regarding whether the file review should include tribal court files. Several tribal representatives objected to a review of tribal court files, as the focus of the ICWA Commission was to analyze and assess the state court's compliance with the Indian Child Welfare Act. The commission ultimately agreed that the review would be limited to state court files. (See Appendix 4 – June 2, 2004 letter from Cheyenne River Sioux Tribe Chairman Harold Frazier and August 10, 2004 letter from Governor Rounds.)

The ICWA Commission also discussed the necessity of a resolution from each tribe authorizing tribal personnel to cooperate fully with the commission. Brenda Bellonger drafted a

resolution for consideration by the tribes at the conclusion of the meeting. The draft resolution was later forwarded to each of the tribal chair for their consideration. Ultimately three tribes enacted formal resolutions: Yankton, Standing Rock and Crow Creek. (See Appendix 5.) Focus groups were held on each of the nine reservations and all of the tribes fully participated with the review team and the work of the commission.

The commission also established its meeting dates and work methods. The commission scheduled further meetings for August 10th in Sioux Falls; October 12th in Rapid City; and December 14th in Pierre. An initial discussion also occurred regarding the feasibility and importance of the ICWA Commission holding Listening Sessions for members of the public on each of the nine reservations and in the two largest urban areas of the state, Rapid City and Sioux Falls. The commission members felt that it was very important to hold public hearings on each reservation to give citizens an opportunity to express their views about the state's level of compliance with the Indian Child Welfare Act. The commission requested that the co-chairs attend each session.

The commission also identified a number of areas in which it would collaborate with the review team to assist with their timelines and work methods. The commission requested from the Review Team, the opportunity to review the questions proposed for the state and tribal focus groups and the compliance review instrument for examining the state court files. The Review Team requested, from the commission, assistance in scheduling the focus groups. The team, upon consultation with the commission, agreed to focus on the Second, Fifth, Sixth and Seventh Judicial Circuits. (See Appendix 6 for agenda and minutes of May 25, 2004 meeting.) Commission members also agreed to each submit to the co-chairs, by July 26th, a list of five barriers to compliance with ICWA for dissemination and discussion at the August meeting. (See

Appendix 7 for submissions received by Commission Members Murphy, Eggebraaten and Wieseler.)

The co-chairs worked closely with the review team through the months of June and July to map out the many logistical details for collecting the data for the ICWA compliance report. On July 8, 2004, the Chief Justice of the Supreme Court issued an order authorizing the review team to examine any court order involving the Indian Child Welfare Act and to keep the identity of families involved confidential. (See Appendix 8.)

C. SECOND MEETING OF THE ICWA COMMISSION

The second meeting of the ICWA Commission occurred on August 10, 2004 in Sioux Falls. (See Appendix 9 for minutes and agenda.) The co-chairs reported on the status of the preparations made for review of the UJS State Court files and correlating DSS files and the efforts to recruit lawyer volunteers to aid the review team in analyzing the files. (See Appendix 10, ICWA Compliance Update Memo.) Virgena Wieseler, Director of Child Protection Services, reported that the ICWA directors for all nine tribes had recently met in Pierre to discuss state and tribal issues and a current list of all Native American children in foster care. The commission also received a telephonic report from Dawn Marie Rubio (NCSC) and Brenda Bellonger (NAILS) on the review teams efforts and project activities to begin the data collection necessary for the compliance report. The review team determined that the majority of state and tribal site visits and focus groups would occur during the month of September.

The membership of the ICWA Commission itself was diverse and included representation from all nine tribes and important stakeholders from many agencies working with Indian children. The commission determined that it would be valuable to conduct a focus group

facilitated by Dr. John Usera of the Chiesman Foundation. Interested members of the public were also invited to attend the facilitated break-out sessions. (See Appendix 11 for a report detailing the commission’s discussion.) This process served to be very valuable in helping the Commission initially identify barriers and issues affecting the State’s compliance with ICWA.

The commission also received a presentation from Mike Schad, on behalf of the Pennington County State’s Attorney’s Office, regarding the mechanics of an abuse and neglect action in state court from the moment of initial removal through a finalized adoption proceeding. Social Workers Denise Murphy and Sara Olson also delivered a PowerPoint presentation regarding the structure of the Department of Social Services and a summary of duties of the different classifications of social workers and their efforts in providing services to families and children.

D. LISTENING SESSIONS AND FOCUS GROUP MEETINGS

The ICWA Commission also finalized the dates and locations for the Tribal Listening Sessions which were scheduled as follows:

- September 10, 2004 Lower Brule and Crow Creek Sioux Tribes
Lode Star Hotel Conference Room
Ft. Thompson, South Dakota

- September 10, 2004 Yankton Sioux Tribe
BIA Courtroom
Wagner, South Dakota

- September 14, 2004 Standing Rock Sioux Tribe
McLaughlin, South Dakota

- September 15, 2004 Cheyenne River Sioux Tribe
Super 8 Conference Room
Eagle Butte, South Dakota

- September 17, 2004 Rosebud Sioux Tribe

	Tribal Building Council Chambers Rosebud, South Dakota
September 24, 2004	Oglala Sioux Tribe Pejuta Haka College Center Kyle, South Dakota
September 24, 2004	Oglala Sioux Tribe Sacred Heart Meeting Hall Pine Ridge, South Dakota
September 25, 2004	Minnehaha County Commission Chambers Sioux Falls, South Dakota
October 8, 2004	Sisseton-Wahpeton Oyate and Flandreau Santee Sioux Tribes Lake Traverse Indian Reservation
October 11, 2004	Public Listening Session Holiday Inn Civic Center Rapid City, South Dakota

The commission requested that the co-chairs be present at each meeting and that commission members would attend as many Listening Sessions as possible and, at a minimum, the Listening Sessions from the districts which they represented.

The month of September brought a flurry of activity for commission members and the review team. The Review Team completed all 40 state focus groups and five of the eight tribal focus groups in the month of September, to wit: state agency focus groups, Sioux Falls, August 30- September 3, 2004; Rapid City, September 13-17, 2004; Pierre, Aberdeen and Huron, September 19-25, 2004. The state focus groups were facilitated by Dawn Rubio and were held in the Second, Fifth, Sixth and Seventh Circuits. Each focus group was scheduled for two hours and tape recorded. Focus group participants were advised in advance that their statements would be kept confidential and anonymous. The Review Team held focus groups with the following stakeholders, to wit: 1) DSS social workers and supervisors from each of the 22 local offices

located within four DSS districts: Western, Central, Northeast and Southeast; 2) personnel from private adoption and placement agencies, including Bethany Christian, Catholic Family Services, Catholic Social Services, Lutheran Social Services, LDS Family Services and New Horizons; 3) state court personnel from the Second, Fifth, Sixth and Seventh Circuits, including judges, court services officers handling CHINS cases, clerks of courts and state's attorneys; 4) juvenile correction agents from the Department of Corrections; 5) public defenders and court-appointed attorneys, and DSS administrators employed within the state office in Pierre.

The tribal focus groups held in September included: Sisseton-Wahpeton, September 1, 2004; Flandreau-Santee Sioux, September 2, 2004; Standing Rock Sioux, September 7, 2004; Cheyenne River Sioux, September 9, 2004; and Crow Creek/Lower Brule, September 13, 2004. Focus group participants included the ICWA worker, judge, prosecutor and other tribal personnel who had job responsibilities related to ICWA cases. Furthermore, members of the public who were knowledgeable about ICWA were invited to attend, and on two reservations community members did participate in the tribal focus groups.

The Review Team also conducted the state court file review from September 7 through September 13, 2004 in the conference room of the Pennington County Courthouse. Mary Beth Kirven, from the National Center for State Courts, directed the file review. The Review Team had previously requested from DSS, a list of all ICWA cases closed between January 1, 2003 and June 1, 2004. From this list, the team randomly selected a total of 133 cases from each judicial circuit proportionate to the number of ICWA cases filed in each circuit. The Unified Judicial System and DSS forwarded the original circuit court and DSS files to the conference room at the Pennington County Courthouse. The Review Team then matched the state circuit court file with the underlying DSS file to ready the files for review. Mary Beth Kirven

personally supervised the file review process which took five days. The Review Team created an ICWA “case record review instrument” and trained the volunteer attorneys on how to utilize the checklist to properly review the file. Ultimately, 94 files were fully available for review as several cases were incomplete or involved non-ICWA cases.

All but two of the listening sessions held by the commission occurred in the month of September. The listening sessions were well attended and intense, as parents, grandparents, aunts, uncles, tribal officials, social workers, attorneys and concerned citizens from all walks of life, testified about the removal of Indian children from their homes and communities and the Indian Child Welfare Act. As the rate of removal of Indian children is disproportionately high, the impact on reservation communities is so far reaching that it touches nearly every family directly or through extended family members. The reservation listening sessions were held at a location selected by the respective tribal ICWA Commission members and were advertised through local media outlets. Members of the general public were urged to attend. The listening sessions were taped but not transcribed by a court reporter because of the cost. In retrospect, it may have been wise to produce a formal transcript of the listening sessions in order to accurately preserve the testimony and effectively communicate the importance of this issue in Indian country. The listening sessions held at Rosebud were broadcast by KINI radio station, and the listening session at Kyle was broadcast by KILI. The summary of the listening sessions are taken from the notes of the commissioners.

The ICWA Commission began each listening session with an opening prayer followed by a summary of Senate Bill 211. The co-chairs explained that the commission did not have the authority to investigate any specific case or change any ruling that had been rendered by a tribal court, state court or South Dakota Supreme Court proceeding. The commission did receive

written testimony and informed those present that they had an absolute right of confidentiality and if they did not wish to have the information shared with other members of the commission, they should not submit it. The commission did receive at several listening sessions, documents from pending or closed cases which would be deemed confidential under state law. Those pleadings are held by the commission co-chairs and have not been disseminated to the commission for review. Many persons who testified described situations which did not implicate the Indian Child Welfare Act, including custody disputes occurring as a result of a divorce, abuse and neglect cases which did not involve Indian children, voluntary placement of Indian children with church groups or charitable agencies and their removal from the community, and decisions made by BIA social workers and tribal courts. The commission was hospitably received on each of the reservations and meals were provided for the commission and members of the community in attendance in McLaughlin, Kyle, Rosebud, Sisseton, and Pine Ridge.

Several themes emerged throughout the listening sessions. First, it is evident that there is a lack of trust between the state and tribal courts and DSS and tribal members. This mistrust runs both ways and is deeply rooted. For example, at the conclusion of the listening session on September 10th in Wagner, South Dakota, at the BIA courthouse, a foster parent approached two commission members indicating that this parent had a very good cooperative working relationship with DSS, but was, however, afraid to testify because of a fear of retaliation from other tribal members who had spoken harshly at the session against DSS. In Eagle Butte, a young mother approached a commission member prior to the initiation of the listening session and indicated that she wished to speak at the listening session but was afraid that DSS would retaliate against her as she had a pending abuse and neglect action. Several persons testified at the listening sessions that they feared reprisals as a result of their testimony before the

commission. Certainly the perceptions and feelings of fear and mistrust must be addressed by both state and tribal stakeholders in order to improve and build relationships between governments to benefit the children.

The commission heard on each reservation frustration from relatives of children who had been taken from the parents or caretakers and parental rights terminated. Many contended that family members received inadequate notification and that children were placed in foster homes off the reservations and that family members who could have provided appropriate homes were never notified or deemed unqualified. Furthermore, artificial or unnecessary barriers hampered them from providing for relative children who were placed in non-Native foster homes. Many persons harshly criticized the performance of DSS workers and some went so far as to accuse DSS of state sponsored kidnapping or harvesting Indian children like a cash crop.

The commission also heard testimony from social workers, supervisors, foster and adoptive parents and family members. The foster parents who testified expressed great love, concern and dedication for the children in their care. One foster parent testified about her desire to adopt a child who had been in her home since the child's birth and the child was now four years old. The matter was under the jurisdiction of a tribal court and the foster parents had not yet been permitted to adopt the child although the family and the child were deeply bonded to each other. Many DSS social workers expressed their frustration with the listening sessions and the work of the commission, alleging that the listening sessions were too one sided in that the reasons for removal of children from individual homes were extremely serious and in some cases, life threatening, contrary to what was portrayed by the parents who testified.

The listening sessions were very painful for both members of the commission and those who testified and those who came to listen. They were, however, very valuable in many

respects. Throughout the listening sessions, consistent themes and barriers to full compliance with the Indian Child Welfare Act were identified. Furthermore, areas in which the tribes can assist the state in complying with ICWA and better serving Indian children were also discussed and brought to the surface. At least 75% of the recommendations made by the commission are based in part from the written and oral testimony received at the listening sessions. Believing it will provide some insight into the testimony heard by the commission, we have briefly summarized the listening sessions which are included in Appendix 12-21. As the sessions were not transcribed, the summaries are based on the notes of the commissioners in attendance. Every effort has been made to accurately identify those who spoke, many of whom did not sign the attendance roster.

E. THIRD COMMISSION MEETING

The third meeting of the ICWA Commission occurred on October 12th in Rapid City, South Dakota. (See Appendix 22 for the agenda and minutes of the meeting.) The commission meeting began with a report from the Review Team regarding their development and data collection activities. The team indicated that it had prepared drafts of the web-based surveys to be completed by state and tribal stakeholders. The drafts had been submitted to the co-chairs for their review and were handed out to the commission for analysis. Members of the public also received draft copies of the stakeholder surveys. The team indicated that the stakeholder surveys would be available for completion over the internet by October 18th. Members of the public asked if they could complete the tribal surveys. This request was denied by the Review Team as it would have skewed the tribal survey data.

Ken Harty, Program Manager for the Child Protection Program of the Sisseton-Wahpeton Oyate Tribe, presented the commission with a summary of the history and development of the tribe's agreement with the Department of Social Services for the provision of child protection services. The tribe has had an ongoing contract with DSS since 1978 and provides a full array of child protection services, including investigations, foster care, licensing of foster homes, adoption and approval of adoptive homes. Mr. Harty indicated that the tribe had good communication with DSS and a strong, collaborative relationship.

Tracey Manywounds, Director of the Child Protection Services Program for the Standing Rock Sioux Tribe, located in both North and South Dakota, described the type of services that her office provides. The SRST has a full contract for the provision of CPS services with the state of North Dakota. Since 1993, the tribe has had a Title IV-E agreement and licensing agreements with the state of South Dakota. Ms. Manywounds presented statistics for her child protection team from the year 2003, which indicated a large caseload with hundreds of children and families served by her office. (See Appendix 25 for SRST statistics.)

Jodi Gillette, Director of the Native American Training Institute, gave the ICWA Commission a PowerPoint presentation about the mission of the Institute. The Institute, located in North Dakota, is comprised of the Spirit Lake Nation, Turtle Mountain Band of Chippewa, Standing Rock Sioux Tribe, Three Affiliated Tribes and the Trenton Indian Service Area. The advisory board is made up of the North Dakota Division of Child and Family Services Director, the North Dakota Division of Juvenile Services Director, the North Dakota Tribal Liaison for Health and Human Services, Casey Family Programs, and a foster parent. She described the unique relationship that exists in North Dakota between the tribes and the state. As the Commission had heard at all the listening sessions about the need for cultural awareness training

for DSS workers and state court participants, Ms. Gillette's presentation was timely and will serve as an important resource for those seeking to implement this type of training. The Institute offers the following courses: Developing Cultural Competency in Human Services; Extending our Families through Unity; Foster Parenting Native Children; Wraparound Services in Indian Country; We are All Related Relationships and Perspective: A Guide for Native American Youth; and Historical Trauma in Native America.

As the Legislature had charged the ICWA Commission with exploring and evaluating DSS's efforts to enter into full contracts with the tribes for providing their own child protection services, the commission invited Emily Iron Cloud-Konen, Cordelia White Elk and Carlette Randall to speak about the status of child protection services on the Pine Ridge Indian Reservation. Ms. Iron Cloud-Konen and Carlette Randall described the work of the Oglala Sioux Tribe in developing an integrated tribal child and family services agency (LOWO). (See Appendix 28 for program summary). The LOWO agency provides strength-based child welfare support services and foster care placement, support and maintenance: recruitment and training of foster parent families and family preservation and reunification services, such as the family group decision making model. The Casey Family Program has provided facilitation and support in building the foundation of LOWO. The South Dakota Department of Social Services Child Protection Agency is an active partner in planning and developing the child welfare system of care framework for the LOWO. The state and the tribe continue to work on a Title IV-E agreement and a full contract with the tribe taking over the full range of child protection services by the projected date of July 1, 2006.

Dr. Usera presented his report from the August 10, 2004 roundtable focus group with the ICWA Commission and members of the audience that participated. Judge Jones and Judge Kern

distributed a draft of proposed specific recommendations for the commission to begin to consider for inclusion in its report to the South Dakota Legislature. The vast majority of the recommendations were obtained from the information received at the listening sessions across the state.

The Great Sioux Nation ICWA Consortium gave an update and indicated that it would be introducing, before the state Legislature, a state ICWA bill similar to the original Senate Bill 211 which was defeated in 2004.

Bernadine Broken Leg also addressed the commission about her 30-year involvement with the Indian Child Welfare Act. She was one of several people who testified before Congress and advocated for enactment of the Indian Child Welfare Act beginning in 1975. Ms. Broken Leg indicated that she was very pleased to see the presentations made by Jodi Gillette, Tracey Manywounds, Cordelia White Elk, Carlette Randall and Emily Iron Cloud-Konen. She testified that the Lakota women were making an enormous difference as they advocated for children and families. She urged the commission to look for dispositional options other than termination of parental rights, which she indicated were contrary to tribal beliefs and nature.

Judge Jones disseminated for discussion, a handwritten outline of the commission's report to the Legislature. The co-chairs indicated that they would work to refine the list of recommendations and begin to prepare a draft of the report, pursuant to the proposed outline.

After the meeting, the Cheyenne River Sioux Tribe, through counsel member and ICWA Commissioner Bob Walters, by letter of November 2, 2004, informed the Review Team that the Cheyenne River Sioux Tribe ICWA staff would not participate in the online surveys, indicating that in the view of the tribe, the surveys were problematic from both a research methods perspective and that the questions asked were not relevant to ICWA compliance issues. (See

Appendix 23.) Furthermore, the Parents Who Care Coalition and Voice of Women issued, on October 19, 2004, a public service announcement and press release protesting the use of the ICWA compliance surveys as a means of data collection by the Review Team. (See Appendix 24 for a copy of the press release.) (Ultimately, the Review Team received only seven web-based responses from tribal stakeholders and because of the small response, only a brief analysis of the survey results was included as part of the Review Team's report.)

F. FOURTH COMMISSION MEETING

The fourth meeting of the ICWA Commission was held on December 14, 2004, at the Ramkota in Pierre, South Dakota. (See Appendix 27.) Dawn Rubio, on behalf of the National Center for State Courts, appeared in person before the commission. Brenda Bellonger, of North American Indian Legal Services, Inc., and Mary Beth Kirven, from the National Center appeared telephonically before the commission. Dawn Rubio presented to the commission, a draft of the Review Team's 100 page report, excluding the voluminous appendix. The draft report contained 30 recommendations to improve compliance with the Indian Child Welfare Act. The commission thanked the Review Team for a very thorough and well-written report, completed in a remarkably short period of time.

The commission then discussed its own set of 75 recommendations and, with the assistance of Dr. John Usera, of the Chiesman Foundation, decided to combine the 105 recommendations and break them out into 11 categories for prioritization. The categories included: Department of Social Services (DSS), State's Attorneys, Training, Courts, Private Agencies, Tribal Support, Placement, Notice, Legislation, Funding and an Other category. The co-chairs then read each of the 105 recommendations, one at a time, and the commission placed

them in the appropriate category by consensus. The recommendations were written by number on the 11 charts on the wall in the commission meeting. Each of the commissioners were then given 36 votes (stickers) and were asked to prioritize within each category, their top recommendations. From this process, the commission compiled a list of the top 30 recommendations.

A delegation from the Great Sioux Nation ICWA Consortium attended the ICWA Commission meeting to express their support for a state ICWA bill. Santee Sioux Tribal Chairman Roger Trudell spoke on behalf of the delegation, emphasizing the importance of compliance with ICWA and urging the state to prioritize the needs of the children. He also suggested extending the life of the commission to ensure that the commission could do a good job. Frank Lamere also offered several suggestions that the commission considered during their deliberations.

The commission decided to receive written submissions until December 27, 2004. Between October 10th and December 27th, the commission received 19 submissions from social workers, parents, foster parents and service providers. (See Appendix 26 for these additional submissions.) One of the written submissions received was a tribal directory which is included in Appendix 32. The Great Sioux Nation Consortium submitted a resolution supporting the passage of a proposed state ICWA bill (See Appendix 30).

The commission's final meeting occurred on December 30 with eighteen (18) members participating in discussions of items outlined in the agenda (Appendix 33). No minutes were created as the commission expired on December 31, 2004. Two motions were passed by the commission at this last meeting:

1. The revision and expansion of the discussion regarding the interplay between ASFA and ICWA in the report and
2. The support of the passage of a state ICWA bill to assist in the implementation of the recommendations of the ICWA Commission. This motion was passed by a roll call vote of 13 in favor and 5 opposed to the resolution.

The commission believes it is imperative to understand both the work and recommendations of the Review Team and the work and the recommendations of the commission. In many cases, the recommendations made by both groups were similar. Included in the body of this report is the Review Team's executive summary and their recommendations, now numbering 34. Immediately thereafter are the 64 recommendations made by the ICWA Commission. (From the initial list of 75 recommendations, the commissioners found 11 to be duplicative.) Thereafter is a combined prioritization of the top 30 recommendations. It is our view that each of the recommendations made by the ICWA Commission should be given strong consideration and prompt attention by the applicable state stakeholders and the tribes.

In many ways it is unfortunate that this commission was not impaneled 25 years ago to begin the important work of building collaborative relationships between each of the tribes in the state and developing trust between the state and tribal courts. Although the ICWA Commission has made some recommendations that involve the expenditure of funds, we deem this to be money well spent to provide necessary and improved services to Native American children. The tribes and the state must develop the political will to enter into full contracts for the provision of child protection services, similar to that in place with the Sisseton-Wahpeton Oyate Tribe since 1978. The state and the tribes must begin to partner in new and innovative ways to break down barriers and improve services to children. The South Dakota Legislature must be willing to fund

additional full-time employees to implement the many recommendations found in this report. The money to provide services to needy children and families will be well spent as it serves as a building block for the future of South Dakota.

The ICWA Commission has submitted a proposed rule before the South Dakota Supreme Court that would permit tribes to appear through counsel or by a designated representative of the tribe in state court abuse and neglect proceedings. Some state circuit court judges will not permit persons to appear on behalf of a tribe unless they are licensed members of the South Dakota State Bar. As many tribes cannot afford to retain legal counsel to appear on behalf of the tribe in ICWA cases, this prohibition results in a barrier for some tribes to effectively advocate in state court.

As regards passage of the state Indian Child Welfare Act bill proposed in 2004 by the Great Sioux Nation ICWA Consortium, the commission has recommended that some form of a state ICWA bill should be passed. The commission was not formally charged by the Legislature with researching the history of this type of legislation across the nation and proposing a bill for the 2005 legislative session. Accordingly, the commission focused its efforts on meeting its charge to identify barriers to compliance and to find workable solutions.

G. SUBSTANCE USE AND ABUSE RECOMMENDATIONS

The ICWA Commission heard testimony on all of the reservations regarding the high rate of removal of Native American children from their families on the reservations. One of the primary factors contributing to the removal of children from Native American homes is a very high rate of alcohol and drug abuse. Accordingly, to address this issue, the commission recommends that the Governor provide additional funding to implement these recommendations:

1. Develop, implement and require a cultural component for all drug and alcohol programs licensed by the state. Provide cultural awareness training for all treatment providers and Chemical Dependency Counselors.
2. Parents who are named as *Respondents* in a petition alleging abuse and neglect should be given first priority to access state services, both for obtaining chemical dependency evaluations and drug and alcohol treatment in state facilities;
3. Expand the availability of half-way houses and structured living settings for parents with children, such as the Full Circle Program in Rapid City;
4. Continue to prioritize the collaboration with tribal officials so that tribal treatment programs would receive state certification; and
5. Fully fund and prioritize drug and alcohol prevention efforts on the reservations and in communities bordering the reservations.

In the Fifth Judicial Circuit, a pilot project is underway to facilitate the recommendation made in paragraph #2. Parents who are *Respondents* in an abuse and neglect action are given first priority to access state services. Judge Von Wald, who served on the commission, indicated that, although the pilot project is in its early stages, this has been a very effective strategy to improve active efforts to Native American families. Again, funds expended to implement these recommendations will be well spent and hopefully prevent the breakup of Native American families.

The ICWA Commission sincerely hopes that each of these recommendations will be given careful consideration and implemented in the years ahead. More than 500 people attended the listening sessions and the commission received dozens of written submissions. Compliance with ICWA and service to Native American children is a vitally important issue. The commission recommends that its life be extended for a period of one year to ensure appropriate follow-up and implementation of the recommendations by the state and tribal stakeholders. It is

the sincere hope of the commission that the tribes and the state agencies will begin to collaborate in a new and effective way to better serve South Dakota's children.

Chapter VI

Child Protection Services

VI. CHILD PROTECTION SERVICES

The South Dakota Legislature charged the ICWA Commission with reviewing the efforts of DSS to enter into agreements with the Indian tribes to provide their own child protection services. The commission provides this summary of the services offered by DSS, the demographical information regarding children in foster care and the efforts to contract with the tribes in response to that request.

The Division of Child Protection Services (CPS), within the Department of Social Services is the legally mandated agency to receive and respond to reports of child abuse and neglect under SDCL 6-8A-9. The Division of Child Protection Services provides services through a workforce of social workers located in twenty-three offices throughout the state of South Dakota. A brief overview of services provided by the Division of Child Protection Services is provided.

A. PROTECTIVE SERVICES

Protective Services is a series of services provided to children to protect them from abuse and neglect as well as safely maintaining them in their homes whenever possible and appropriate. The initial services include intake and screening of referrals of child abuse and neglect involving parents, guardians or custodians as defined in South Dakota Codified Law (SDCL) 26-8A-2. Reports received by Child Protection Services are reviewed for immediate danger, foreseeable danger and risk factors to determine the appropriate screening and response decision. In FY 2003, Child Protection Services received 15,584 abuse/neglect reports. Approximately 33% of the reports were assigned for intervention by CPS and/or law enforcement. In FY 2004, Child Protection Services received 15,925 abuse/neglect reports and

approximately 30% of the reports were assigned for intervention by CPS and/or law enforcement.

If a report is assigned for intervention, a social worker will complete an Initial Family Assessment (IFA) with the family. The IFA is a thorough family centered evaluation of child maltreatment and family functioning with outcomes related to maltreatment, risk and safety. The assessment centers around information gathered regarding the maltreatment, circumstances of the maltreatment, child functioning, discipline, parenting, and adult functioning. During the assessment process, an immediate protective plan may be required. The Immediate Protective Plan provides an option to deal with immediate danger during an IFA, without placing a child in Child Protection Services custody. The children can stay with relatives or family friends where they will be safe until the IFA can be completed.

A Safety Evaluation is completed at the conclusion of the IFA to determine if the children can safely remain in the home or if they need to be removed from the home. If maintained in their home, an in home safety plan is developed to control the safety influences identified during the IFA. The plan is put in place to keep the children safe while the parents work on treatment issues identified in the case service plan.

The IFA provides information to determine if services need to be provided at the conclusion of the intervention. Families that are served are families where children are identified as being unsafe, families with ratings of significant, high or moderate risk. Services provided by Child Protection Services will include the development of a case service plan with the family to provide assistance to help reduce the risk of maltreatment and to insure the children's safety. If a child has been removed from their home, reunification can be considered when Child Protection

Services can conclude that the safety threats have been eliminated or the safety threats still exist but can be controlled and managed adequately with an in home safety plan.

B. FOSTER CARE SERVICES

Foster care is a protective service that the Department makes available to children and families who must be separated because of abuse or neglect. This service is provided by kinship family homes, family foster homes, group care centers, and residential treatment centers on a temporary basis, and for a planned period of time. Foster care services include matching children with an appropriate care provider; the development of a case service plan; supervision of the child in placement; ongoing evaluation of needs; the determination of need for changes and planning in relationship to the child's legal custody status; and the movement of the child to a permanent living arrangement such as reunification, placement with kin, guardianship, continued placement in foster care with emancipation and adoption.

Before a child can be placed into any out of home setting, care, control and custody of the child must be assigned to the Department of Social Services by a court of competent jurisdiction, either through state or tribal court. Tribal courts often retain custody of the child, while granting the Department of Social Services placement and care responsibilities.

A parent or guardian may voluntarily assign temporary care, control and custody to the Department for not more than 30 days with a possible extension of 30 days. The Department only accepts this type of custody to allow for the preparation and placement of a child that is to be released for adoption or the parent or guardian is in immediate need of medical treatment which will cause the parent or guardian to be hospitalized and there are no other resources available to provide the necessary child care.

The Division of Child Protection Services provides the following types of placements for children who cannot remain in their home:

- **Kinship/Relative Placement** provides a child 24-hour temporary care and supervision by a relative while permanent plans are developed.
- **Emergency Care** can be either in a family foster home or shelter care facility, which is licensed and provides care for a period not to exceed 30 days.
- **Basic Family Foster Home Care** provides a child 24-hour temporary care and supervision, while permanency plans are developed. This home must be licensed. Children placed at this level generally are experiencing normal developmental problems as well as issues associated with separation and attachment.
- **Specialized Foster Care** provides a child 24-hour temporary care and supervision for which permanency plans are being made. The home must be licensed. Children placed at this level are experiencing special problems beyond those associated with normal child development and/or separation attachment. Children with physical disabilities, adolescents with behavior problems, and children with developmental disabilities are examples of children who might be placed into specialized foster homes.
- **Family Treatment Home Care** provides 24-hour family foster home setting while receiving intensive residential type treatment. The purpose of this level of care is to either prevent placement in a more restrictive setting such as a residential treatment center or shorten the length of residential care by providing a foster care setting where the family is trained and supervised by the residential care facility or other licensed child placement agency such as a community mental health center.
- **Respite Family Foster Home Care** is 24-hour temporary care and supervision for a foster child for the purpose of giving the present provider a planned break from providing care. The respite home provider must be licensed. This type of care will generally last only a couple days a month to several days every couple months depending on the foster family's needs.
- **Group Care** provides 24-hour service for children with family and interpersonal conflicts. Children are not able to respond in a family setting or may require ongoing counseling in a structured program using community based resources.
- **Residential Treatment** provides 24-hour services for children who have behavioral or emotional problems requiring intensive professional assistance and therapy in a highly structured, self-contained environment.
- **Psychiatric Residential Care** provides 24-hour intensive psychiatric treatment within a residential setting. Children in such settings are severely emotionally disturbed and demonstrate many out of control behaviors.

Monthly Average Number of Children By Level Of Care

Level of Care	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004
Kinship/Relative Care	164	180	191	169	182
Basic Foster Care	536	587	596	595	622
Specialized Foster Care	66	74	79	72	76
Family Treatment Care	42	46	64	78	82
Emergency Care	104	116	120	126	133
Group & Residential Care	168	209	240	267	257
Psychiatric Facilities	51	56	59	62	72
Out of Home Paid Care	994	1088	1158	1200	1243

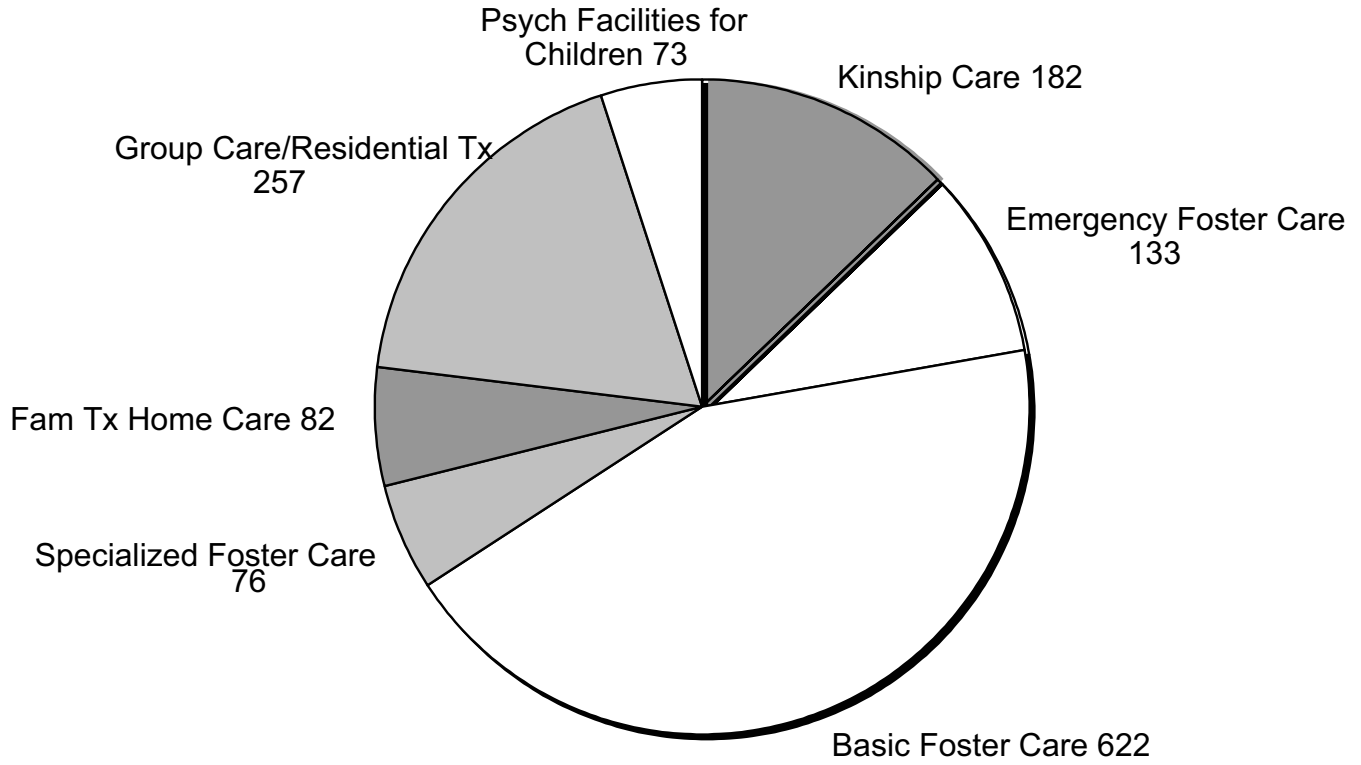
During FY 2004, approximately 60 children that were placed in foster homes, were placed with relatives who were licensed to provide foster care.

Outcome Measures

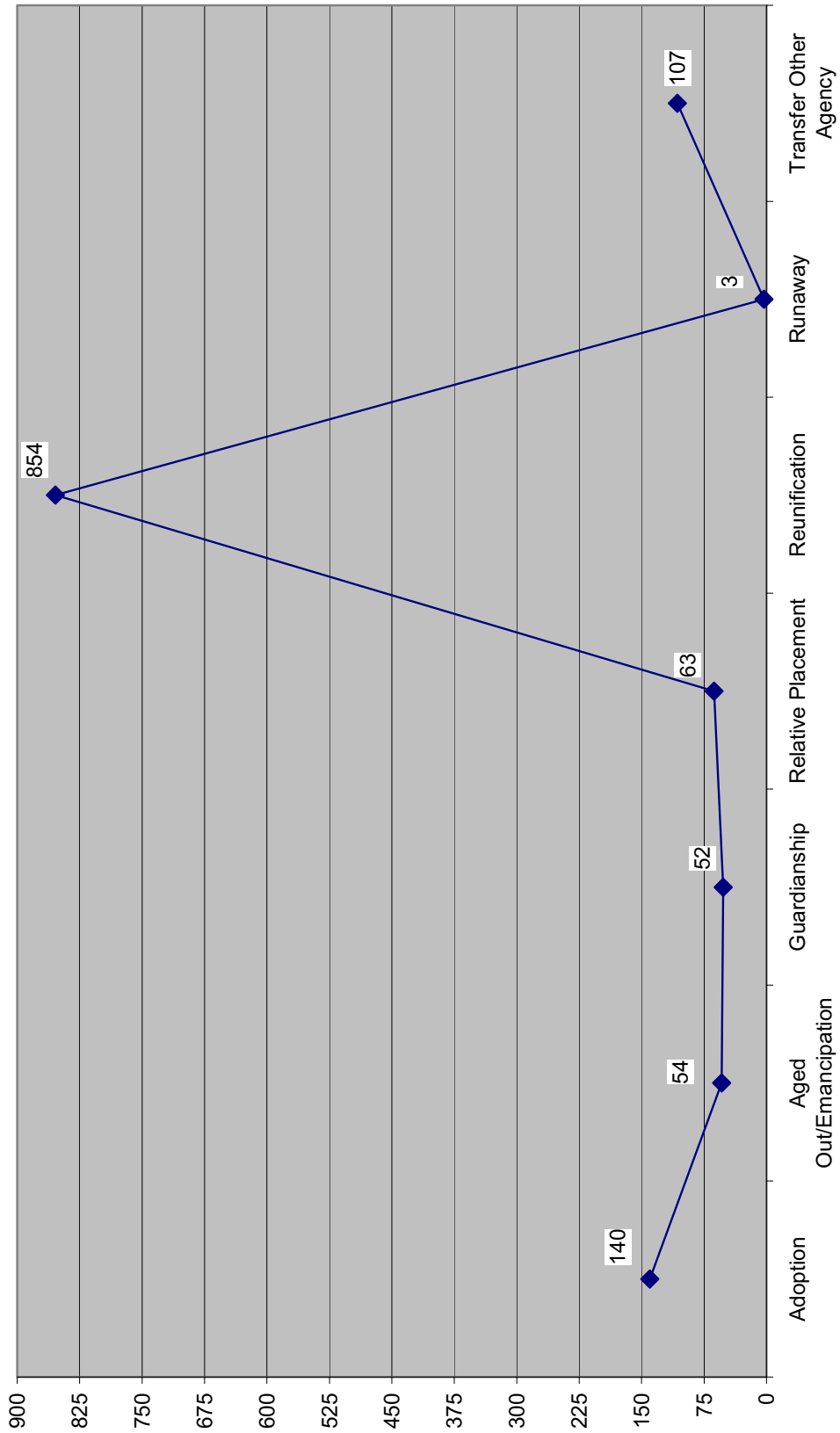
	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004
Children Returned Home	634	753	784	782	767
Children Placed For Adoption	90	106	163	140	137
Children Emancipated	26	34	38	54	52
Children Placed Into Guardianships	11	33	24	52	52
Children Placed With Other Permanent. Plan	103	120	190	240	160

Children in Alternative Care for FY 2004 (Average number per month)

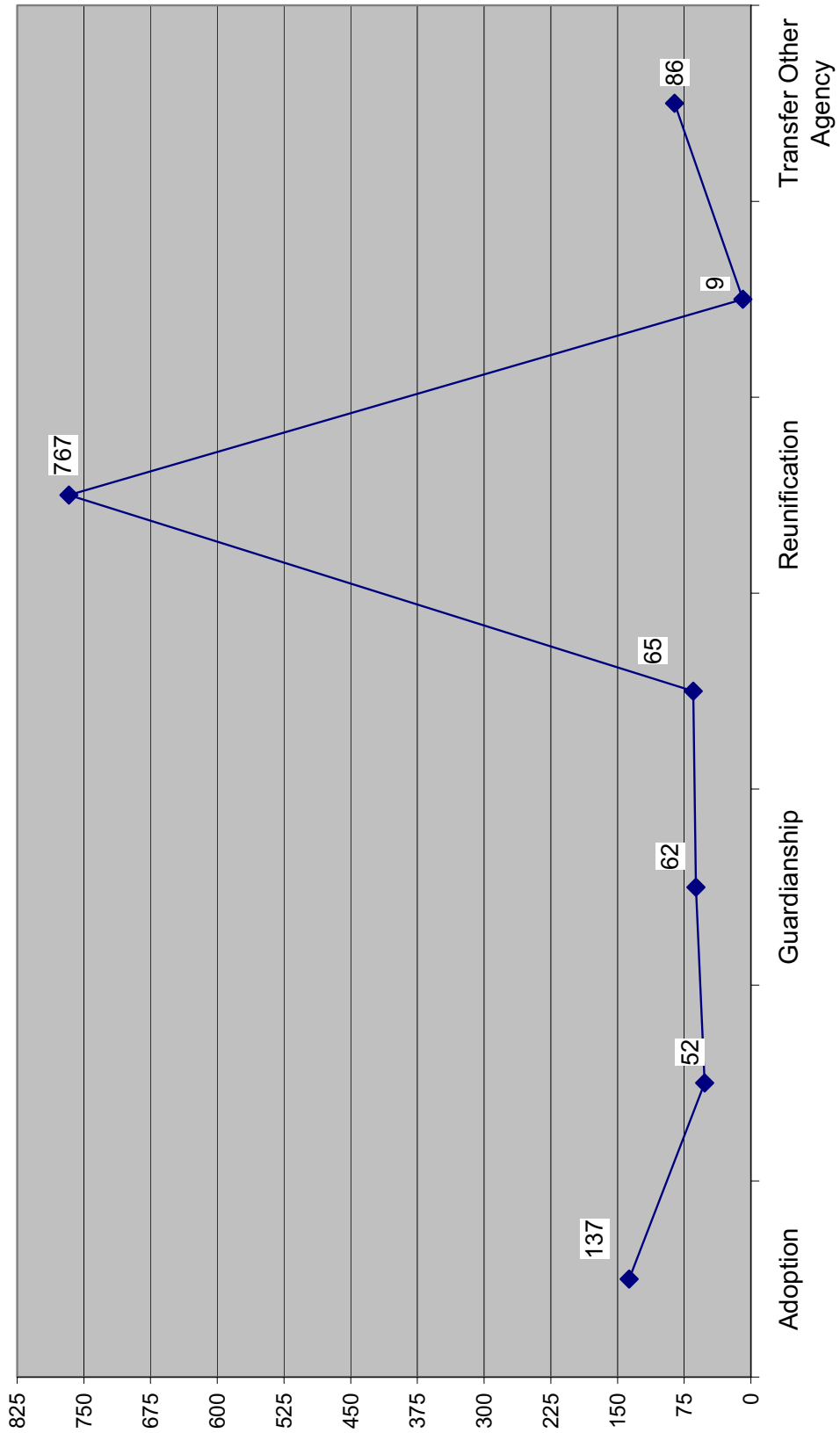
Total Average Children in Care per Month = 1425



Children Discharged from Alternative Care by Discharge Reason for FY 2003
Total Children Discharged=1273



Children Discharged from Alternative Care by Discharge Reason for FY 2004
Total Children Discharged=1178



Demographics of Children In Care

	White	Native American	Other	Male	Female	Age 0-4	Age 5-11	Age 12-15	Age 16-18
FY 2004	37%	60%	3%	53%	47%	26%	34%	27%	13%
FY 2003	38%	59%	3%	53%	47%	27%	36%	24%	13%
FY 2002	33%	64%	3%	51%	49%	29%	39%	21%	11%
FY 2001	31%	65%	4%	51%	49%	25%	34%	28%	13%
FY 2000	32%	62%	6%	52%	48%	25%	38%	25%	12%
FY 1999	30%	64%	6%	51%	49%	25%	39%	25%	12%

C. KINSHIP CARE

The Division of Child Protection Services entered into a contract with the South Dakota Children’s Home Society on July 1, 2002 for the completion of kinship and Interstate Compact home studies. The purpose of the contract was to increase the ability of Child Protection Services to assess all relatives that could be potential placement resources. Another objective was to expedite the home study process for these families, which allows the agency to make more timely decisions regarding relative placements. From the beginning of the contract through November of 2004, 598 home studies have been completed. For the first 5 months of FY 2005, there have been 120 completed home studies.

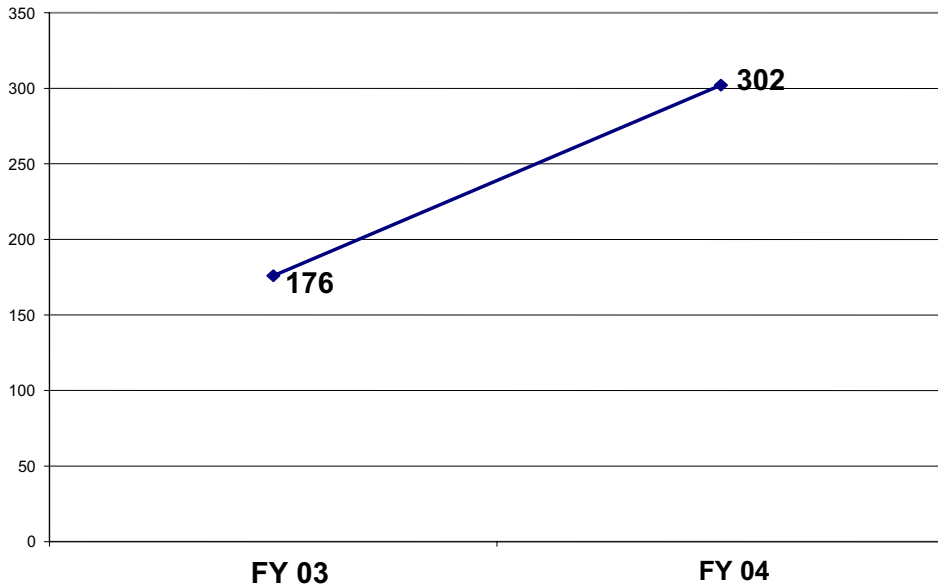
Child Protection Services recently completed revision of policy and procedures related to the Kinship Care. Technical assistance will be provided for all Child Protection Services staff to review the revised policies and procedures to elevate the importance of kinship care and the efforts required to locate safe and appropriate kinship placements.

The Division of Child Protection Services is also committed to reviewing its definition of relative within policy and procedure to be more sensitive to how family is defined in Native American culture.

When children are placed with relatives, the relatives have two options for reimbursement. They may choose to become licensed as foster family to be eligible for a monthly foster care payment. They may also choose to apply for TANF for the children placed in their home. Both options provide Title XIX coverage for the children. Due to the difference in payment amounts between the foster care and TANF payments, with the foster care payment being higher, the Division of Child Protection Services has begun discussions with the Division Economic Assistance to address this issue.

The completed home studies are broken down by State fiscal year in the following chart.

Completed Home Studies by Fiscal Year



D. LICENSING OF AGENCIES AND FAMILY HOMES

Federal law requires licensure or approval of any agency or family home that is reimbursed with federal dollars for the care of children or adults. SDCL 26-6-9 requires licensure (regulation) of all child welfare agencies by the Department of Social Services and SDCL 26-6-16 authorizes the department to develop standards of child care to be used for the regulation of these agencies. These laws form the basis of licensure of child welfare agencies in South Dakota and are found in Volume 9 of the South Dakota Codified Laws.

Child welfare agencies regulated by the Division of Child Protection Services include residential treatment centers, group care centers for minors, family foster homes, child placement agencies, maternity homes, and independent living preparation programs. Licenses issued by the Division of Child Protection Services are effective for one year and an annual licensing review, including a visit to the facility/home is required before issuing a new license.

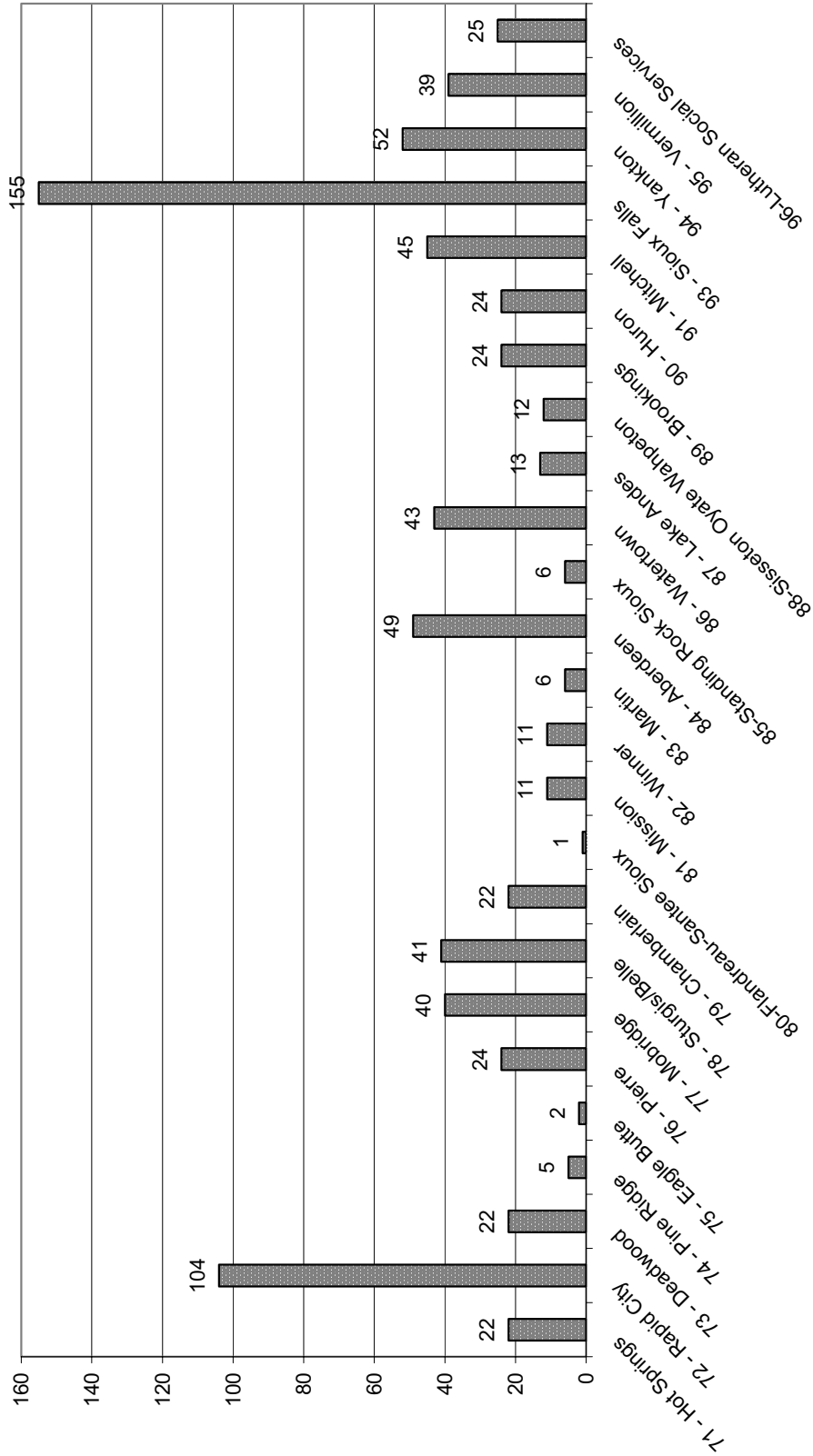
The licensing program administered by Child Protection Services is intended to reduce risk to clients in care outside their own homes by establishing and enforcing regulations that require maintenance of minimum standards of care. In addition to their prevention efforts and appropriate responses to client abuse, neglect, injury, exploitation, or other areas of noncompliance, licensing workers also offer consultation, upon request to caregivers to help them increase quality of care beyond minimum standards.

Licensing responsibilities include the recruitment of foster and adoptive homes, preparing foster and adoptive families utilizing the PRIDE (Parents Resource For Information, Development and Education) pre-service orientation and mutual assessment

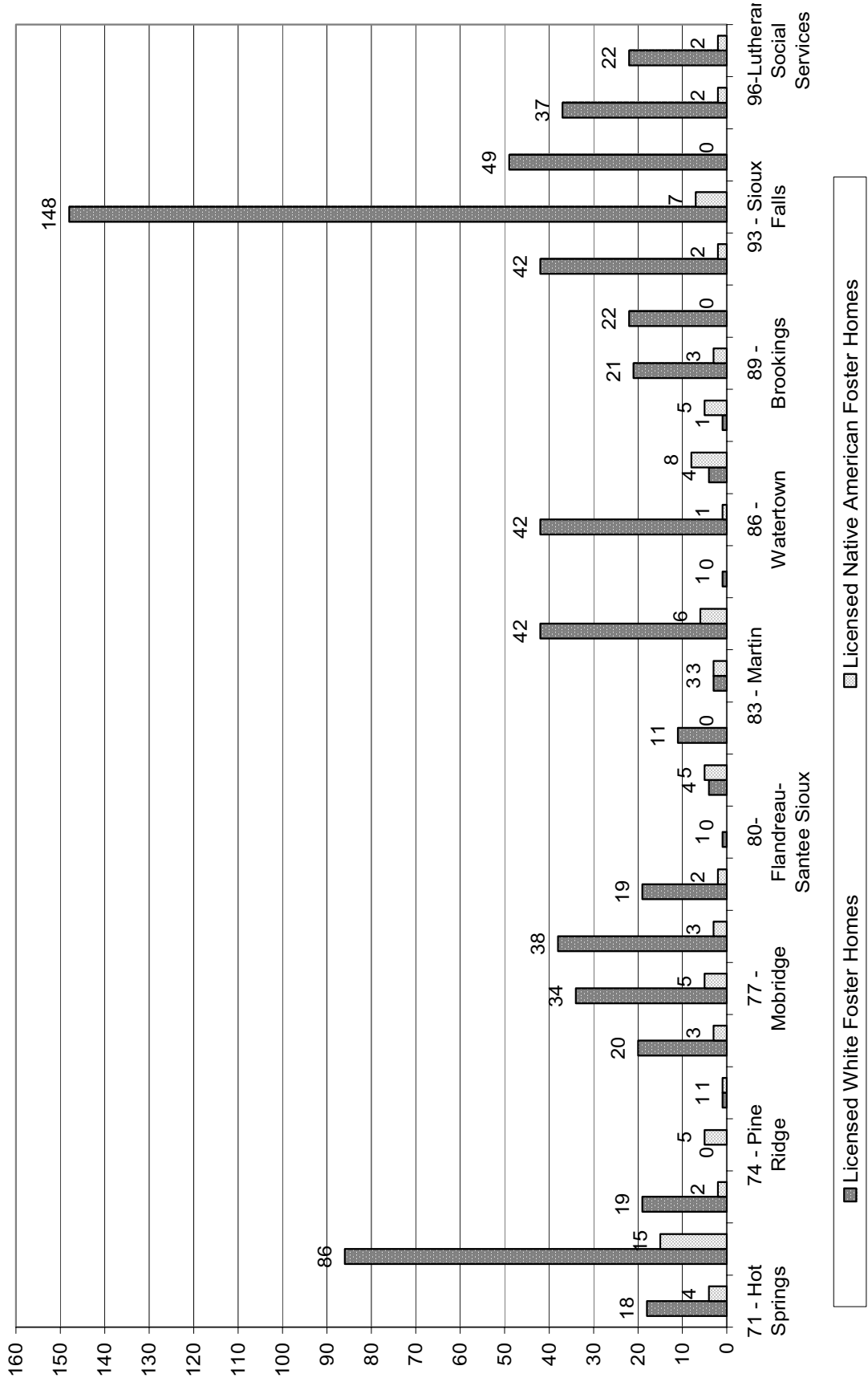
process, providing on-going training opportunities to foster families, providing support services to foster homes, licensing foster homes, and providing consultation to licensed providers. The Licensing Program Specialist located in the state office is responsible for licensing and providing consultation to residential treatment centers, group care centers for minors, child placement agencies, independent living preparation programs and maternity homes as well as policy and program development in the area of child welfare agency licensing. The Program Specialist is also involved in review of investigations of abuse and neglect in out-of-home care and review of screenings for child abuse and neglect and criminal record checks for individuals working or residing in a child welfare agency licensed by CPS.

The Office of Child Protection Services uses the PRIDE program to strengthen the quality of family foster care and adoption services by providing a standardized, consistent, structured framework for the competency-based recruitment, preparation, assessment and selection of foster parents and adoptive parents, and for foster parents orientation, in-service training and ongoing professional development. The program was developed by the Child Welfare League of America and a consortium of states, including South Dakota. Child Welfare League of America and the consortium of states continue to assess and update the program through the PRIDE National Advisory Committee which includes the Adoption and Licensing Program Specialists from the Division of Child Protection Services. Child Protection Services has also adopted the Extending Our Families Through Unity curriculum in an effort to recruit Native American families to provide adoptive, foster and kinship care for Native American children requiring out-of-home placement and increase the cultural awareness of foster parents.

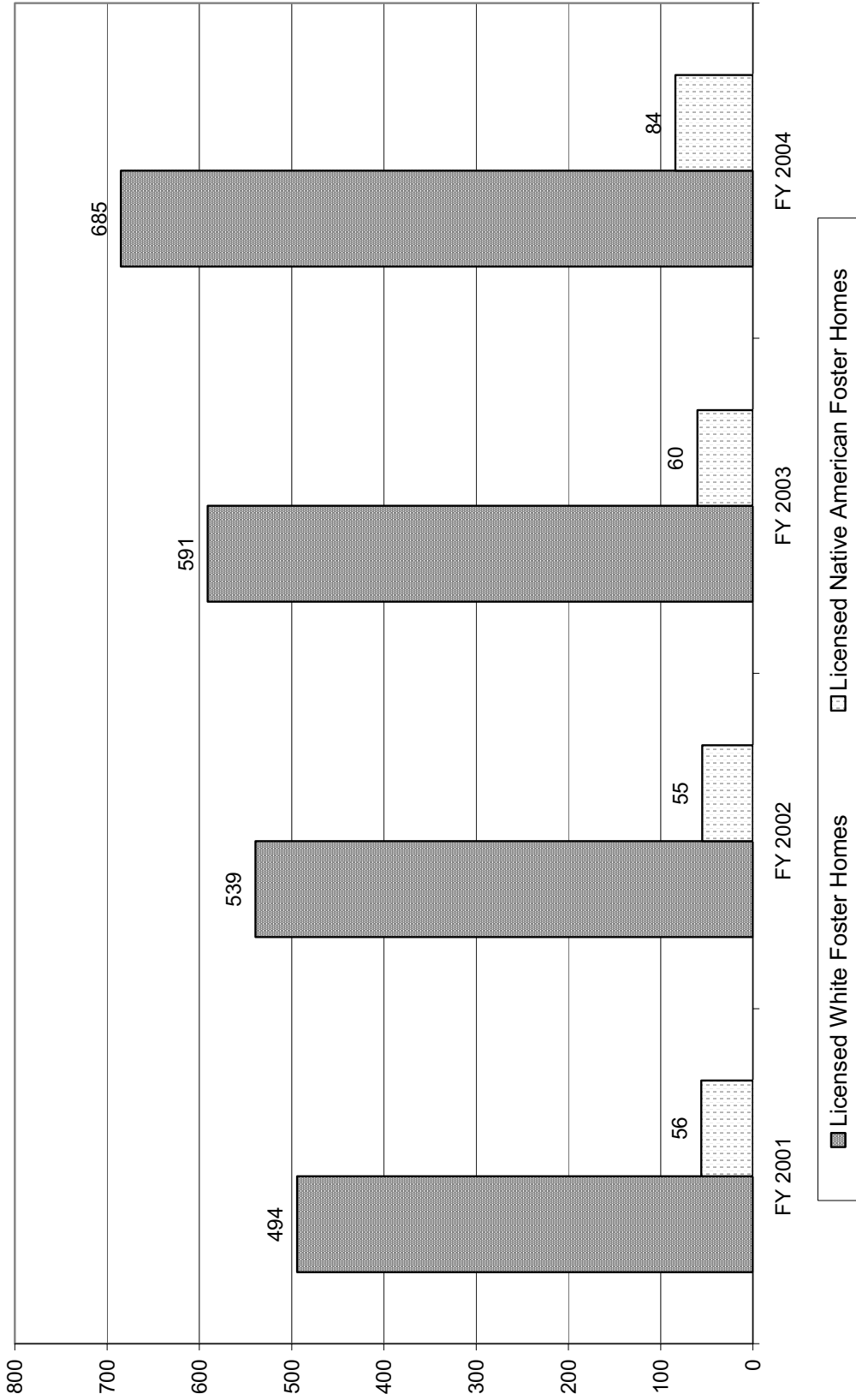
**Number of Foster Homes by Office for FY 2004
Total Foster Homes=798**



Foster Homes by Race for FY 04
Total White Homes=685 Total Native American Homes=84



Foster Homes by Race for Fiscal Years 2001-2004



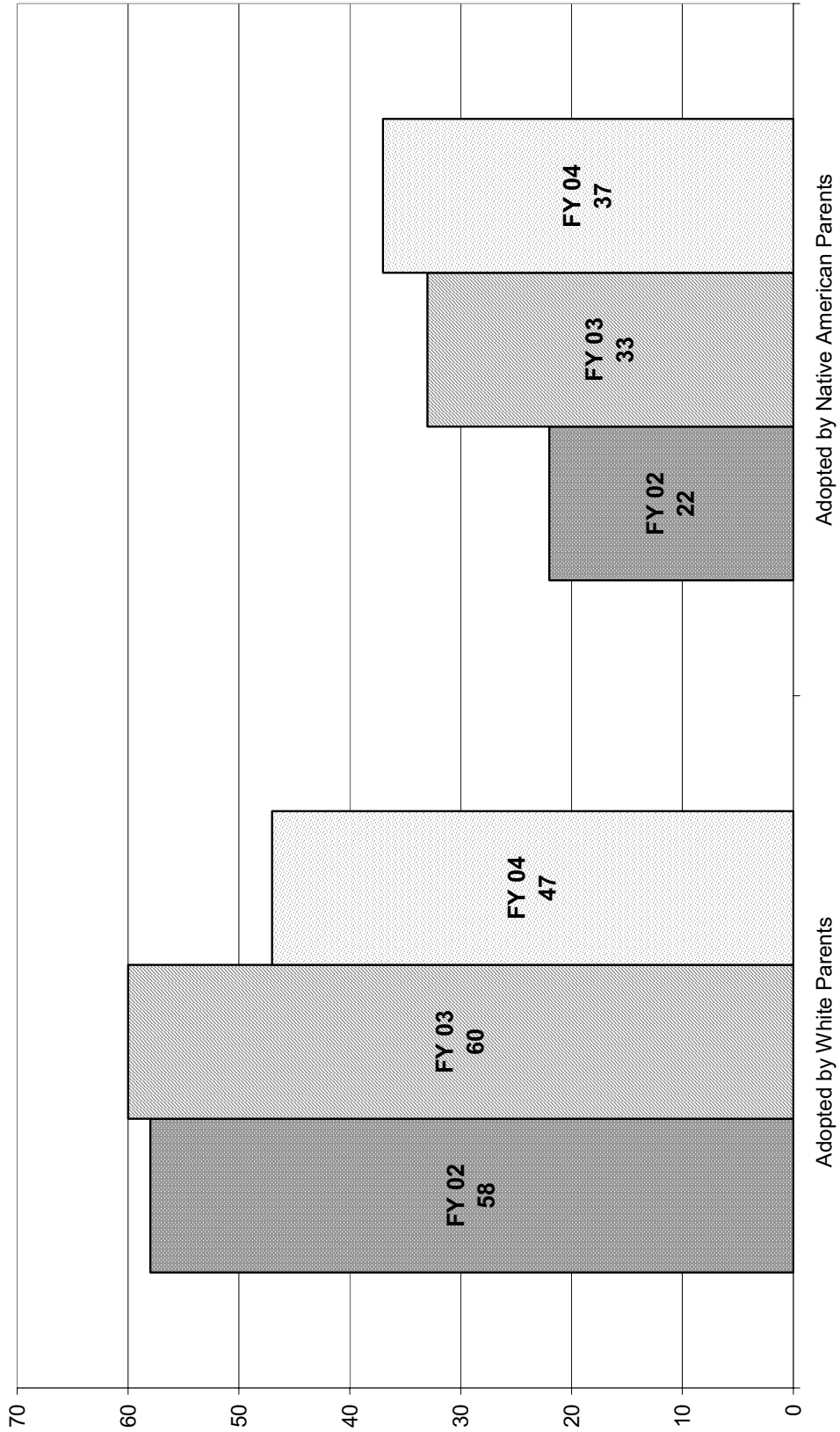
E. ADOPTION SERVICES

When a decision is made that a child cannot safely return to the home and parental rights are terminated, adoption may become the permanent plan for the child. Child Protection Services specializes in recruiting, training and approving adoptive families for special needs children, adoption placements and linking families to post-adoption services.

Special needs children are abused and neglected children that might be more difficult to place in a permanent home due to the child being physically, behaviorally or emotionally disabled, a member of a sibling group, the child's age or race or any combination of these factors. All children who have been abused and/or neglected are considered to be special needs children.

Child Protection Services offers adoptive families maintenance and/or medical subsidies to assist the family in providing for the special needs of their adopted child. The social worker and the adoptive family negotiate the type and amount of the subsidy with approval by the Adoption Program Specialist. The maximum subsidy amount cannot exceed the basic foster care rate for the age of the child.

**Adopted Native American Children by Adoptive Parent Race
Total by Fiscal Years 2002-2004**



F. PARENTING EDUCATION PROGRAM

In July 1998, the Department of Social Services, Division of Child Protection Services implemented a Parenting Education Program, making “Common Sense Parenting” classes available on a statewide basis. The South Dakota legislature passed SDCL 25-10-5, 25-10-5.3, 26-8A-21 and 26-10-1 which required judges to order parenting education for parents who have abused or neglected their children, have been found guilty of a crime involving domestic violence or who seek protection orders as a result of domestic violence. The Common Sense Parenting curriculum addresses parenting skills for parents of children ages three to sixteen. Responsive Parenting, developed through the Division of Child Care Services, is also offered for parents of infants through children three years of age.

The Parenting Education Partners (PEP’S) offer and provide parenting education services to identified high-risk families who are referred by Department of Social Services, Division of Child Protection Services. This also includes referrals from caseworkers from within the TANF Program, families referred through the school social workers supported by Department of Social Services, and families referred through the courts and those families who refer themselves. It is the intended goal to educate parents, guardians, or legal custodians to become more skilled in their parenting abilities and ensure a safe non-threatening home for children to reside.

There are currently seven Native American parenting education trainers.

Federal Fiscal Year	04	03	02	01	00
“Common Sense Parenting “ classes	224	205	191	193	143
Parents attending classes	1637	1591	1,561	1,501	1,193
Children impacted by parent’s attendance	3260	2915	2,859	2,836	2,030

G. INTENSIVE FAMILY SERVICES

Intensive Family Service was developed in 1996 and is provided jointly by the Department of Corrections, Department of Labor, Department of Human Services and the Department of Social Services. This pre-aftercare program is a multi-departmental effort of various state agencies to provide an opportunity to families of youths who are placed under the jurisdiction of the Department of Corrections to address issues and access needed services to allow their children to return to their homes with the greatest opportunity for success. The purposes of Intensive Family Services are:

- To assess the ability of the parent(s) and family to serve as an appropriate placement resource for the youth upon release;
- To reduce or eliminate issues present within the family that may contribute to or allow delinquent behaviors;
- To provide a well-informed, fact-based recommendation to the Department of Corrections regarding the feasibility of the youth to be successfully reunited with their family.
- To promote the successful reintegration of the youth into their family upon their return or placement in the home upon release; and
- To reduce the likelihood of recidivism of the youth to the Correction System through improved family functioning.

H. INDEPENDENT LIVING SERVICES

The Independent Living Program (ILP) is designed to assist the transition of youth in the custody of the agency from foster care to self-sufficiency through multiple services in the areas of employment, education, life skills, housing, health, connections, as well as youth development opportunities. Youth in the custody of political subdivisions other than Department of Social

Services, such as Department of Corrections, Bureau of Indian Affairs (BIA) and Tribes are able to access services under this program.

Independent Living Services are provided through agency staff with assistance from five contracted Community Resource Persons (CRP). The five (CRP) provide services and training with all eligible youth in the six domains (employment, education, housing, connections, life skills, and health.) The five CRPs are located in (1) Rapid City, (2) Sioux Falls, (1) Pierre, and (1) Aberdeen. At the present time, all youth who are identified as eligible for Independent Living Services are referred for services to the CRP.

Child Protection Services invited a number of stakeholders, including tribes, to attend a planning meeting for the development of Independent Living Services five-year plan in 1999 and 2004. The five-year plan is included in the Child and Family Services Plan.

YOUTH SERVED FROM 10/01/2003 TO 09/30/2004		
Gender:	Male	224
	Female	215
Age Under 16		73
Age 16		103
Age 17		116
Age 18		90
Age 19		39
Age 20		12
Age 21		6
Race: Native American		225
Race: White		184
Race: Other		30

I. FAMILY AND CHILDREN INFORMATION SYSTEM (FACIS)

Child Protection Services instituted FACIS, Family and Children Information System in 1994 in response to federal legislation. South Dakota was one of four states selected to use the

national prototype. The prototype was received in 1995 and development continues to occur. FACIS was piloted in two offices from October 1998 to May 1999. The other offices were converted across the state from June 1999 to July 2002. Upon completion of the conversion of the CPS offices, conversion was completed by the Sisseton Wahpeton Oyate Tribe, the Crow Creek Tribe, the Standing Rock Oyate Tribe and the Flandreau Santee Sioux Tribe. These tribes were converted to FACIS because of the contract and agreements between the state and the respective tribes.

FACIS consists of four major entities which assist the social worker and supervisor in managing cases. These entities are Request for Service (RFS), Client, Family and Resource. FACIS is being upgraded on a regular basis as new functions or enhancements are added to the system. FACIS has provided many benefits to staff and to CPS as an agency:

- Count of all the Requests for Services taken by CPS staff,
- Electronic file available for centralized case reviews,
- Improved data collection to meet the federal AFCARS reporting requirements,
- AFCARS data is also used within CPS to monitor case status and trends,
- On-line reports available to staff,
- Staff use FACIS for making payments, such as foster care payment, transportation payment, residential treatment and group care payments and other payments for services,
- FACIS has functions to support the CPS program areas such as protective services, foster care, kinship care, adoption, licensing of foster homes, licensing of facilities, independent living, and intensive family services.

J. TRAINING

All Child Protection Services staff complete the Social Worker Certification, which includes 156 hours of training and 6 competency exams. The first step of certification is the completion of the pre-test, which occurs before the social worker attends any of the certification

training. This exam is used as a baseline to establish the social workers general knowledge prior to the training process. The social worker will then enter into the training rotation beginning with the first available training event.

The Initial Family Assessment training includes 36 hours of classroom instruction, 2 hours of field supervision, and a competency based consultation of a completed Initial Family Assessment with the local supervisor and a program specialist from state office.

This training covers interviewing skills, engagement, risk and safety assessments, immediate protective plans, safety evaluations, safety analysis and in-home safety planning. An integral part of the Initial Family Assessment is the change in the approach to the family from that of an interrogational approach similar to law enforcement to one that attempts to engage the parents and recognizes them as the true experts regarding their family.

The social workers attend the PRIDE training along with the prospective adoptive and foster parents. This training is 30 hours. The staff is trained along with the adoptive and foster parents to assist them in understanding the foster/adoptive parent perspective. The PRIDE training primarily focuses on: honoring and maintaining the child's family and cultural connections; self-assessment regarding the ability to provide care to foster and/or adoptive children; understanding abused and neglected children's behaviors; non-physical discipline; the development of a team with the foster parent, birth parent, and social worker working towards reunification; attachment and separation issues; and child development. After the social worker completes this training, a competency exam is completed.

FACIS training is a 26-hour training component regarding the data entry system. Staff is guided through the system in an interactive training from the intake through adoption screens. A competency test is completed requiring navigation in the system at the end of the training cycle.

Family Dynamics is a 12-hour training event, which includes information regarding cultural awareness, cultural competency, indicators of abusive families, self-assessment regarding potential personal reactions in working in child welfare, the use of eco-maps and the use of genograms.

Intake and Screening is a 4-hour training, which outlines the protocol for receiving a request for services regarding an allegation of abuse and neglect and the criteria for assignment of those calls for an Initial Family Assessment.

Case Management is a 16-hour training session which includes a written competency exam at the end of the training. Case Management focuses on working with parents, children, kin and foster parents; development of the case plan; involvement of the parents, kin and foster parents in the case planning process; the negotiation process; teamwork with parents, kin and foster parents, and federal requirement and mandates. The overview of federal mandates includes the Indian Child Welfare Act, the Adoption and Safe Families Act and the Multi-Ethnic Placement Act.

Meeting Children's Developmental Needs/Parenting Skills is a 12-hour training session focusing on child development, separation and attachment, parenting assessment, the importance of kinship, maintaining family and cultural connections, the importance of visitation, and parenting dynamics, including the impact of cultural beliefs on parenting.

Legal training is a four hour training, which focuses on state statutes, federal laws, abuse and neglect court protocols, and testifying. This session includes the Indian Child Welfare Act and the Adoption and Safe Families Act.

Business English is an 8-hour training, which provides an overview of the proper use of English in correspondence, documentation, emails, etc.

Customer Service is a 4-hour training specifically targeted at improving our interactions and relationships with families, colleagues, and other professionals.

Worker Safety and Injury Identification is a 4 hour training led by an agent from the Department of Criminal Investigation. This training is primarily focused on the social worker's safety, interactions with law enforcement, and identification of non-accidental injuries.

After the social worker completes the 156 hours of training, they are required to take a post-test knowledge exam. This exam includes questions regarding all of the training sessions. If a social worker does not pass the knowledge exam or any of the other competency exams, remediation is required. A child protection social worker is not certified until all of these requirements have been satisfactorily achieved.

Additionally, training is offered to child protection staff through the Annual Social Worker Conference and Management Conferences as well as community trainings.

K. TRIBAL INITIATIVES: Status of Child Welfare Contracts and Agreements Between the State and the Tribes

The Indian Child Welfare Act authorizes State and Indian Tribes to enter into agreements with each other regarding care and custody of Indian Children. Title IV-E of the Social Security Act also authorizes State and Tribes to enter into Title IV-E Agreements for the payment of foster care for children determined to be eligible for Title IV-E funding and for administrative funding associated with staffing and training of staff and foster and adoptive parents. Contracts and agreements between the State and Tribes are discussed in the following section.

Sisseton-Wahpeton Oyate Tribe has been providing child welfare services for many years. Child Protection Services entered into a contract for the provision of child welfare services with the Sisseton-Wahpeton Oyate Tribe in 1978. The Sisseton-Wahpeton Oyate Tribe

provides the full array of child welfare services encompassing intake, investigations of reports of child abuse and neglect, services to families, kinship care, foster care, adoption and related services as well as licensing foster families and adoption approval.

The contract provides administrative funds for the operation of the program, as well as Title IV-E funds to pay for out of home placements for children eligible for this federal funding source and for the training of foster and adoptive parents. The number of Title IV-E children served during FY2004 was 31.

The Sisseton-Wahpeton Oyate Tribe also developed licensing standards for the licensure of family foster homes, which are recognized by the State. The licensing standards were developed to meet the needs of the tribe's families and their children.

Standing Rock Sioux Tribe has been providing a child protection program for the reservation since 1993. The Bureau of Indian Affairs Social Services had been providing these services until the Standing Rock Sioux Tribe contracted the child protection portion and developed a tribally run system.

The Standing Rock Sioux Tribe signed the IV-E Agreement with the State of South Dakota to access federal funding for foster care and residential treatment needs for their children in 1993. During state fiscal year 2004, the average number of children the agreement served was twenty-five, the average for the children under the BIA (638) funding was approximately forty-five.

The Standing Rock Sioux Tribe developed licensing standards for foster homes which are recognized by the Department of Social Services in South Dakota. Licensing requirements for the Tribe were developed to meet the needs of the families on Standing Rock.

Standing Rock Child Protection Services include a foster care system and protective services. Legal jurisdiction for all families within the Standing Rock Sioux Reservation boundaries lies with the tribal court system.

The Title IV-E Agreement has been in existence since 1993, however the working relationship between the Department of Social Services and Standing Rock Child Protection Services has flourished in the past (2) years. During this period, the following have developed: FACIS training for staff in accessing the payment for foster care or residential treatment from Title IV-E, training sessions on Title IV-E requirements, Training for SRCPS Case managers and Social Workers in case management skills, file review and follow up, Independent Living component, training dollars for foster parents, as well as ICWA directors' quarterly meetings.

Future projects to be developed with the Department of Social Services would include Case manager's certification for Standing Rock Child Protection Services staff, development of the ability to access Title IV-E administrative reimbursements, as well as accessing the Medicaid Reimbursements for the Tribes and the State Social Services. These reimbursement pieces can be a vital part for both systems as the programs will be able to generate funds to improve programming.

Crow Creek Sioux Tribe entered into a Title IV-E Agreement with the State of South Dakota to access federal funding for out of home placements in 1995. The agreement was later expanded to include administrative costs associated with Title IV-E training activities. The number of children served under the Title IV-E Agreement during FY2004 was 8. The Crow Creek Sioux Tribe also developed licensing standards for foster family homes which are recognized by the State.

In addition to Title IV-E funding, the State has provided FACIS training for staff to access payment for Title IV-E children placed in out of home care, training on Title IV-E requirements, training for agency staff in case management, Independent Living Services, and access to the State's training program for social workers.

Flandreau Santee Sioux Tribe and the State of South Dakota entered into a Title IV-E Agreement to access federal funding for out of home placements in 2000. The agreement also includes expanded administrative costs associated with Title IV-E training activities. The Flandreau-Santee Sioux Tribe also has licensing standards for foster family homes that are recognized by the State and designed to meet the needs of the tribe's families and their children.

The director's position for the Flandreau-Santee Child Protection Program was vacant for a number of months, but was filled during the summer of 2004. The new director and Child Protection Services are re-establishing a working relationship to serve children eligible for Title IV-E funding and related services.

Oglala Sioux Tribe with the assistance of the Casey Family Programs and Oglala Oyate Iwicakiyapi Okolakiciye (OOIO), a multidisciplinary group from the Pine Ridge Reservation, has been working towards the development of an Integrated Child Welfare Program. This includes a contract with the Department of Social Services for the provision of child welfare services including intake, investigation, case management, alternative care, adoption, licensing of foster homes and approval of adoptive homes. CPS has been actively involved by attending meetings, providing data about CPS, and detailing the requirements that must be met for contracting. The goal is to enter into a full contact for the provision of child welfare services by June 30, 2006.

Rosebud Sioux Tribe with the assistance of the Casey Family Programs in Rosebud is actively working on moving toward the development of a child protection contract with the state. This effort is not as far advanced as the Oglala Sioux Tribe effort, but it is following a similar development and implementation plan with support from the Department of Social Services.

Yankton Sioux Tribe and the State of South Dakota entered into a contract for the provision of child welfare services in 1988 patterned after the Sisseton-Wahpeton Oyate Tribe's contract with the State. The contract was renegotiated each year until FY2000 at which time the contract was terminated by joint agreement of the Yankton Sioux Tribe and the State of South Dakota.

Cheyenne River Sioux Tribe and the State of South Dakota entered into a contract for the provision of child welfare services in 1996 patterned after the Sisseton-Wahpeton Oyate Tribe and the Yankton Sioux Tribe contracts. The contract was renegotiated each year until FY2001 at which time the contract was terminated by joint agreement of the Cheyenne River Sioux Tribe and the State. The State worked with the Tribe offering extensive technical assistance between FY2000 and FY2001 to make the necessary improvements, but it was not successful.

There is recognition by the State of South Dakota that the tribes want very much to operate their own child welfare programs. Efforts by the Oglala and Rosebud Sioux Tribes to contract child welfare are ongoing and provide a model for other tribes to follow should they choose. The Cheyenne River and Yankton Sioux Tribes have voiced their interest in exploring child welfare contracts again with the State of South Dakota. The state is willing to collaborate and partner with each tribe to enter into licensing agreements, Title IV-E Agreements and child welfare contracts.

L. CHILD PROTECTION SERVICES & ICWA DIRECTORS MEETINGS

The Department of Social Services, Division of Child Protection Services and the ICWA Directors for the nine (9) tribes began meeting in July 2004 and are committed to holding quarterly meetings to develop working relationships and develop collaborative efforts in the following areas:

1. Develop transfer protocols between the state and the tribes, which take into consideration the safety and well being of the child, while maintaining the child's cultural connections with their tribe and family;
2. Develop a directory of ICWA offices with the names of ICWA staff, along with mailing addresses and telephone numbers for each tribe to be shared with all Department of Social Services offices and state court personnel. Assure that the directory is maintained and updated as needed;
3. Provide ICWA Directors and their respective offices with the names, addresses and telephone numbers of management staff for the Division of Child Protection Services and assure that the listing is maintained and updated as needed;
4. Assure that ICWA Offices are notified of and invited to participate in Permanency Planning Review Team meetings conducted by the Division of Child Protection Services for all Indian children under state or tribal court custody;
5. Division of Child Protection Services will continue to provide the ICWA directors of each tribe with a monthly report listing all of their respective tribe's Indian children in state or tribal custody;
6. Work together to identify, locate and assist relatives to become caretakers of children in the custody of the state or in the custody of the tribes with placement, care and supervision with the state;
7. Explore joint training opportunities such as a statewide ICWA conference for state and tribal social workers, attorneys, CASA, state and tribal judges, etc;
8. Develop a plan to for ICWA social workers and state social workers to shadow each other to better understand the roles and responsibilities of each program;
9. Development of a cultural connections form for Child Protection Services staff to complete for every Native American child entering placement;

10. Review the Program Improvement Plan and the Child and Family Services Plan for South Dakota with the ICWA directors and seek their input and assistance in meeting the needs of Native American families and their children.

Indian Child Welfare Program Specialist

The Department of Social Services, Division of Child Protection Services, will be hiring an individual to oversee policies and procedures within the Division of Child Protection Services that impact the provision of services to Native American families and children. Responsibilities of the Program Specialist include but are not limited to the following tasks:

1. Establish, implement, monitor, and enforce policies, procedures, and protocols regarding Child Protection Services' compliance with the Indian Child Welfare Act. This will include assisting in CPS response to ICWA Commission recommendations.
2. Child Protection Services liaison to the tribes to collaborate and coordinate with the tribes to assure effective provision of services to tribal children and families that comply with federal and state mandates and tribal codes.
3. The ICWA Program Specialist will monitor existing agreements and contracts for compliance and will provide technical assistance to tribes that have an agreement or contract with the Department of Social Services.
4. Assist the Division Director of Child Protection Services in the development of licensing agreements, Title IV-E foster care agreements, and child protection services contracts between the Department of Social Services and the tribes.
5. Conduct training assessments of Child Protection Services staff regarding the Indian Child Welfare Act, Indian culture, maintaining cultural connections, cultural sensitivity and ongoing education regarding cultural competence and develop a training plan to address identified needs.
6. Oversee the quarterly meetings between Child Protection Services and the ICWA directors;
7. Act as liaison between the State/Tribal Workgroup and Child Protection Services.
8. Increase the tribal involvement in the activities association with the Program Improvement Plan and the Child and Family Service Plan.

M. STATE-TRIBAL WORKGROUP

In December 2001, Child Protection Services invited representatives from all nine tribes, Children's Home Society, and Casey Family Programs involved in the licensure of family foster homes to a meeting to establish a state/tribal workgroup to focus on increasing Native American placement resources and improving efforts toward maintaining cultural connections. The workgroup met quarterly in calendar year 2002 and twice during calendar year 2003. The workgroup completed a comparison of state and tribal licensing standards due to the concern that state licensing standards created barriers to families becoming placement resources. It was found that state and tribal standards were similar in many ways except that the state had a lower limit in the number of children that could be placed in a licensed home. The workgroup also looked at ways that potential families could be encouraged to become placement resources. A subgroup was to work on a brochure on foster parenting that was intended to inform people and dispel myths about foster parenting.

The State-Tribal Workgroup did not meet again until November 2004, in conjunction with recruitment/retention strategic planning project facilitated by AdoptUSKids. AdoptUSKids is funded by the federal government to provide technical assistance and training services to help states and Indian tribes to be more effective in the recruitment and retention of foster and adoptive families. AdoptUSKids' mission is broader than the word "adoption" might imply and includes recruiting and retaining foster, kinship and other resource families for children that can help preserve and support appropriate family connections and permanency outcomes for children. During the week of November 1-5, 2004, AdoptUSKids facilitated focus groups and a strategic planning session. The strategic planning group which included members of the state/tribal workgroup, Child Protection Services licensing staff, foster parents, and private

agency representatives determined that there were five critical issues that needed to be addressed by the strategic plan. The critical issues and the related goals included in the strategic plan are:

Critical Issue 1: Building successful State/Tribal relationships (both local and statewide).

Goal 1: State and Native American Tribes/communities will work together in the spirit of reciprocity, equality and accountability to create and optimize resources (including funding, time commitment, policy, leadership) to better serve children in placement in accordance with the requirements of ICWA.

Critical Issue 2: Recruitment & Retention – the retention of resource families is a critical indicator as to the health of the system. Having motivated families helps to make everything else possible.

Goal 2: South Dakota will have and retain an adequate number of culturally appropriate families who are willing and qualified to meet the needs of the children in care.

Critical Issue 3: Extended family placements and connections/identity.

Goal 3: South Dakota's first priority is to place children with extended families, as defined by the child's culture.

Critical Issue 4: Maintaining the cultural identity of the children in resource families.

Goal 4: South Dakota will model a culturally competent approach to child placement that honors and supports the child's connections.

Critical Issue 5: Public image (move from an adversarial agency that removes kids to a supportive agency that places kids).

Goal 5: The public image of placement services is that birth, kinship, foster and adoptive families are a valued and supported resource to ensure family preservation and permanency of children.

It was determined that the state-tribal workgroup needed assistance in establishing clearer goals and that the members needed to have a greater sense of shared responsibility rather than it being a mostly state driven project. The strategic plan includes goal and strategies that with the use of National Resource Center facilitators will work toward improving the direction of the workgroup.

Recruitment of placement resources that are culturally appropriate to the needs of children in care is a goal of the State's Child and Family Services Plan and the Program Improvement Plan. The state sees the State-Tribal Workgroup as a valuable resource in the achievement of the goals and strategies in this area of the Child and Family Services Plan and Program Improvement Plan. Child Protection Services includes input from the State-Tribal Workgroup into the development and implementation of the Child and Family Services Plan and the Program Improvement Plan.

N. FAMILY GROUP DECISION MAKING

The Division of Child Protection Services and the Casey Family Programs in Pine Ridge and Rosebud entered into a Memorandum of Understanding in April 2004 regarding a collaborative effort for Casey Family Programs to offer Group Family Decision Making to families involved with Child Protection Services from the Pine Ridge and Mission offices. The goal of Family Group Decision Making is facilitate the preservation and stability of families by providing a forum for families to make plans that are designed to ensure the safety, permanency and well-being of their children and youth when the child has entered or is at risk of entering the child welfare system.

The Child Protection Services office in Rapid City is also moving toward implementing Group Family Decision Making with assistance from the Casey Family Programs in Pine Ridge.

O. CHILD PROTECTION AND THE TRIBAL COURTS

In April 2004, Child Protection Services, along with National Child Welfare Resource Center on Legal and Judicial Issues sponsored a meeting regarding the Adoption and Safe Family Act mandates and the interrelationship with the Indian Child Welfare Act. Participants included Child Protection Services supervisors, ICWA directors, tribal prosecutors and tribal judges. The meeting was held as a result of the Program Improvement Plan and the information from the meeting was utilized in the development of the Child and Family Services Plan.

P. CHILD WELFARE FUNDING

When children are removed from their home as result child abuse and neglect or a child is at risk of abuse and neglect and cannot be maintained safely in the home, requiring placement in a licensed foster home or facility, payment for the placement is made through a combination of state and federal dollars. The funding sources utilized by Child Protection Services are determined by the type of placement. Funding sources for placement outside the home include the following:

1. Title IV-B can only be utilized to pay for basic foster care placements and is also a funding source for adoption subsidies when a child is not Title IV-E eligible. For every dollar spent, federal funding provides 75% and the state provides 25%. Tribes are eligible to apply for Title IV-B funds directly from the federal government.
2. Title IV-E can only be used for placements after a child has been determined be to eligible based on the AFDC guidelines as of July 1, 1996. Eligibility must be maintained throughout the child's placement episode in order for Title IV-E funding to continue. Title IV-E funds can be used to pay for all levels of placement, except psychiatric levels of care. Title IV-E is an allowable funding source for adoption subsidies. For every dollar spent, federal funding provides 65.57 % and state funding provides 34.43 %.

When the State and the Tribes enter into Title IV-E Agreements for the payment of placement costs for Title IV-E eligible children, the state does not require the Tribes to provide the funds to match the federal dollars. The State provides the match out of

state general dollars. The federal government does not allow Tribes to access Title IV-E funding directly, therefore agreements with the State are required.

3. Title XX is utilized for short-term emergency situations and is an extremely limited block grant, which accounts for a very small portion of the placement budget.
4. Title XIX is utilized for placement in facilities that are certified by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) such as Sioux Falls Children's Home and Black Hills Children's Home and the treatment portion of residential treatment and group care placements. For every dollar spent, federal funding provides 68.68 % and state funding provides 31.32%.
5. Temporary Assistance for Needy Families (TANF) as authorized under the Emergency Assistance provision, is utilized for placement costs for children during the first 365 days of care, if a child is not eligible for Title IV-E funding.
6. Child's OWN Funds are utilized to pay for a child's care if available through funding sources such as Supplemental Security Income, Social Security benefits, and other income resources.

During FY 2004, expenditures for children placed in various levels of care totaled \$20,947,238, with over 28% or \$5,867,133 coming from state general funds utilized to match federal funds.

Adoptive Incentive Payments were authorized by the Adoption and Safe Families Act of 1997. Adoptive Incentive Payments were originally authorized to provide incentives funds to States to promote permanency through adoption for children where reunification was not possible. Adoption Incentive Payments were reauthorized under the Adoption Promotion Act of 2003 of Title IV of the Social Security Act. The 2003 amendments maintain an emphasis on children with special needs and focuses attention on promoting adoption of children that are age nine and over. Incentive payments are based on the number of finalized adoptions that exceeds the state's set baseline in the categories of foster child adoptions, older child adoptions or special needs adoptions. South Dakota will receive \$20,000 for federal fiscal year 2004 for the finalized adoptions of five children, age nine and over. The funding received through this federal program

is 100% federal funds and is utilized to support post adoption services for all children placed with adoptive families, regardless of whether the adoption was initiated through the Department of Social Services, private child placement agencies or independent adoptions.

There is the perception by some that the state's goal is to obtain more federal funding by removing children from their homes and terminating parental rights. Statements to the affect that Child Protection Services "harvest children as a cash crop" and runs "nothing more than a state sponsored kidnapping program" are offensive and totally inaccurate. Child Protection Services recognizes that children are best served by remaining in their homes, but only if they can be safe and protected. When that is not possible, Child Protection Services has the responsibility to provide for the safety and protection of children and take the necessary steps to do so.

Chapter VII

Research Findings

VII. RESEARCH FINDINGS

The ICWA Commission reviewed a draft copy of the Executive Summary on the *An Analysis of Compliance with the Indian Child Welfare Act in South Dakota Report* from the National Center for State (NCSC) and North American Indian Legal Services, Inc. (NAILS) at the December 30, 2004 meeting. Suggestions for changes within the Executive Summary were presented to the Dawn Rubio of NCSC, but the final document was not available for approval by the commission. The following is the Executive Summary with the suggested changes.

A. Introduction

Senate Bill 211 established the Governor's Commission on the Indian Child Welfare Act and authorized the commission to study the requirements of the Federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901-63. Senate Bill 211 further states that the Governor shall *appoint an independent reviewer to complete an analysis of compliance with the Act by the Department of Social Services, the state attorney, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which Indian tribes can assist the state and private agencies in achieving compliance.* The National Center for State Courts (NCSC), a non-profit court services organization, in partnership with the North American Indian Legal Services (NAILS), a non-profit tribal services organization was appointed by the Governor's Office as the independent reviewer to perform the ICWA compliance analysis. In performing the analysis, NCSC and NAILS focused particularly on compliance with the ICWA requirements.

This Executive Summary highlights the methodology and findings associated with the *ICWA Compliance Analysis Project*, with specific emphasis herein on ICWA compliance. The

final project report *An Analysis of Compliance with the Indian Child Welfare Act in South Dakota: Final Report* is a detailed discussion of the methodology, data collection efforts, findings, and recommendations. The *Final Report* also contains a complete discussion of relevant background information including a discussion of: ICWA and its history; South Dakota laws and guidelines for judicial practice in child abuse and neglect cases; the Adoption and Safe Families Act, Public Law 105-89; the Bureau of Indian Affairs' Guidelines for State Courts, and Title IV-B state and tribal agreements. Additionally, the *Final Report* contains a discussion of issues related to ICWA compliance including training, technical assistance, written standards, and protocols. Moreover, tribal perceptions of state ICWA compliance, strategies to improve compliance, and means by which the Indian tribes can assist in pursuing the policies, procedures, spirit, and intent of ICWA are presented. Finally, the *Final Report* contains a series of thirty-four recommendations, which are intended to improve ICWA compliance, in fact and in spirit, as well as to enhance the environment for effective and optimal ICWA compliance.

B. Methodology

The NCSC/NAILS project team developed an interactive, multi stage, and multi-method approach to gather the quantitative and qualitative information necessary to complete the analysis of ICWA. The analysis included a review of the agencies (specifically referenced in SB 211 that are involved in the exercise and application of ICWA including the Department of Social Services, Office of Child Protection (DSS), the Office of the State's Attorney, the Unified Judicial System (UJS), and private adoption, licensing, and foster care agencies. Additionally, the NCSC/NAILS project team engaged in a series of interactions with each of the nine Sioux tribes in order to identify the means by which the tribes can assist in pursuing ICWA-based

policies. The specific primary data collection activities included: DSS and UJS Case File Review; State Focus Groups; Tribal Focus Groups; and Intensive File Review.

C. Findings: DSS and UJS Case File Review

UJS court files and corresponding DSS files were reviewed using the “ICWA Case Record Review Instrument.” From a DSS-provided list of 358 closed cases (between January 1, 2003 and June 1, 2004), 135 were selected for review proportional to the total number of ICWA cases by judicial circuit. Of these, 94 cases (involving 190 children) met review criteria. To qualify as complete for file review, the reviewers needed to have both the court file and the corresponding DSS file. Of the 94 cases reviewed 32 involved emergency removal, which means that an abuse and neglect petition was not filed and/or the children were returned to the home within 30 days of removal.

Identification of Children as Indian for the Application of ICWA

Determining how or whether DSS or the court made a determination of whether a child was Indian was one of the most difficult tasks in the record review process, as neither the court nor DSS regularly stated how they determined the heritage of a child. Reviewers checked all methods used to identify the heritage of the child, therefore the number of responses do not correlate to the actual number of case files as more than one response may have been checked for a single record. The exception to this is the number of files where there was no indication of how heritage was determined.

- In 15 percent of the records reviewed, no documentation existed of how the court or DSS determined that the child was Indian.
- Thirty-two percent of cases involved the report of the parent or custodian of the child.

- The records indicate that other than direct contact with the tribe, DSS and the courts are generally relying on non-documented evidence to establish the heritage of children to whom they believe ICWA is applicable.
- Many of the DSS files contained completed tribal enrollment applications but there was no indication that the applications were ever notarized and filed with the tribe, sent to the tribe, or whether the tribe responded to the application by denying enrollment or by issuing a tribal enrollment identification card.

Proper Notice of Proceedings Involving an Indian Child

Often more than one method had to be employed, for example, notice may have been sent by registered mail but been undeliverable, therefore, notice would be given a second time by publication. Only notice to the mother, father, tribe, and BIA for the initial hearing on the abuse and neglect petition was tracked. Tracking notice was difficult because “Certificates of Service” were not routinely used and although a copy of the return receipt would be placed in the file, there usually was no indication which documents were sent with it. ICWA requires that the tribes and the parents be advised of their right to intervene, ask for an extension, have the action transferred to the tribal court, and for parents to be represented by counsel.²⁰ The ICWA notice content requirements were met in the majority of the files reviewed. It is difficult from the file review to determine whether notice is being timely served. In some instances notice was given but was clearly untimely as it was not received by the party at least ten days prior to the date of the proceeding.

- In 122 instances, notice was via registered or certified mail.
- Untimely notice was given to the tribes 13 percent of the time; to the father 16 percent of the time; to BIA 19 percent of the time; to the mother 22 percent of the time; and to “others” 23 percent of the time.

²⁰ 25 USC 21 section 1911(b),(c) and 1912(a)-(b)

Proper Exercise of Jurisdiction over Indian Children

The child's tribe has the right to intervene and/or request jurisdiction over any foster care placement or termination of parental rights action involving a child who is not domiciled or residing on the reservation.²¹

- Tribes intervened in 64 percent of the involuntary removal cases, requested jurisdiction be transferred to a tribal court in 29 percent of the cases, and accepted jurisdiction in 32 percent of the non-emergency removal cases.
- In 29 percent of the cases, the tribe did not respond after receiving notice of the proceedings.
- The most common reason for not granting jurisdiction to the tribe after it requested jurisdiction was the late stage of the proceedings at which the tribe asked for jurisdiction.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

Before a child can be placed in foster care or parental rights terminated, the court must be satisfied that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts were unsuccessful.²²

- Active efforts were not always documented by the court; however, the court usually made a finding that active efforts had been made.
- In 42 of the 62 non-emergency case files, the court determined that active efforts had been taken to prevent the breakup of the family.
- Nine of the files did not specify what active efforts had been taken while 33 case files contained documentation of at least one active effort, although in most cases multiple efforts were documented.

Qualified Expert Witnesses

An Indian child may not be placed in foster care in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.²³

²¹ 25 U.S.C. 21 section 1911(b) and (c)

²² 25 U.S.C. 21 section 1912(d)

²³ 25 U.S.C. 21 section 1912(e).

- In sixty-three percent of the non-emergency cases where the child was removed from the home, the court heard testimony from either a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or a professional person having substantial education and experience in the area of his/her specialty.
- Professional persons were used almost twice as often as a lay expert with knowledge of social and cultural standards of the child's tribe.

Placement of Child Pursuant to ICWA Preferences

The ICWA placement preferences are: (a) a member of the Indian child's extended family; (b) a foster home licensed, approved, or specified by the Indian child's tribe; (c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.²⁴ ICWA also requires that an Indian child be placed in the least restrictive setting that approximates a family and within reasonable proximity to the child's home.²⁵ Specific information pertaining to the least restrictive setting was not always found in the case files.

- Forty-five percent of the files reviewed did not clearly indicate whether ICWA preferences were followed.
- Of the 62 non-emergency cases involving foster care or pre-adoptive placement, 16 cases (26 percent) had placement with an extended family member, six cases (ten percent) involved non-ICWA placement preferences, and in 28 cases (45 percent) whether ICWA preferences were followed could not be determined.
- Having multiple siblings on the same file compounded the difficulty in determining whether the ICWA preferences were followed as often siblings had different outcomes, e.g. one sibling may have been placed with an extended family member while another child was placed in foster care.
- Often the file would state that the children were placed in foster care but no information on whether the foster parents were Indian or whether the children were placed together was provided.
- The six instances of non-ICWA preferences were cases where good cause was provided by the court to justify the use of non-ICWA placements.

²⁴ 25 U.S.C. 21 section 1915(b)

²⁵ 25 U.S.C. 21 section 1915(b)

- Unless good cause was given or it was shown that placement met ICWA preferences, the placement type was counted as unknown. Therefore, the unknown category should not be construed as non-compliance with ICWA, but only that the record does not clearly state whether the placement was an ICWA preference.
- Specific information pertaining to the least restrictive setting was not always found in the case files and the percentages reflect court findings that the child was in fact placed in the least restrictive placement most closely approximating a family and in close proximity to his or her home. This was done in almost three-quarters of the cases reviewed.

D. Findings: State Focus Groups

Participants during the 40 individual focus group sessions included DSS supervisors and social workers, UJS judges, court services officers, and clerks of court, state attorneys, private adoption and placement agency personnel, DOC juvenile agents, and court-appointed attorneys and public defenders. During the focus group sessions participants were asked to comment upon the following areas : Positive and Negative Aspects of ICWA; ICWA Training, Technical Assistance, Written Standards; ICWA Current Practice, Determination, and Compliance; Barriers to ICWA Compliance; and Improving ICWA Compliance.

Identification of Children as Indian for the Application of ICWA

The determination of whether the child is an Indian child is primarily the responsibility of DSS in abuse and neglect cases and adoptions, through initial and ongoing efforts such as intake and family assessment forms.

- In most cases, the state attorney and the judges report that they rely upon the DSS representation of the child's Indian heritage.
- The role of judges regarding the determination of the applicability of ICWA and whether the child is an Indian child varies throughout the state.
- Regardless of whether there is an initial determination or not that ICWA applies, according to all focus group participants, in an abundance of caution the case proceeds as though ICWA is applicable until such time as there is a determination otherwise.
- Private adoption agencies determine whether the child is an Indian child. In the event ICWA is applicable (i.e., enrollment, enrollment eligibility, domicile, etc) birth parents are notified of the agency's requirement to notify the tribe for placement. As reported by the private adoption agencies participants, in most instances birth parents either sign an affidavit requesting that the tribes not intervene in the adoption or elect to parent their child rather than advise the tribe.

Proper Notice of Proceedings Involving an Indian Child

While practices do vary across the state (as to the format and type of notice), focus group participants convey that they engage in active notification processes.

- DSS social workers and supervisors indicate that initial notice of removal and of the 48-hour hearing is provided to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs.
- All state attorneys participating in the focus groups report that the initial petition is forwarded via registered mail to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs.

Appointment of Counsel in ICWA Cases

During focus groups, judges report that the appointment of counsel for parents and children is routine in all abuse and neglect matters, regardless of whether the case involves ICWA or not.

- Appointment of counsel for the child is required by South Dakota Statute 26-8A-18 upon the filing of the petition.
- Generally, counsel for a parent, who is present for the hearing, is also appointed early in the proceeding.
- The attorney appointment process varies across the state.
- The only reported concern with the appointment of counsel is that the quality of representation depends upon the skill, knowledge, and ability of the attorney.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

A reported yet unintended benefit of ICWA was that it created within DSS a culture of active efforts for all children. According to one DSS social worker, “we provide active efforts and remedial services all the time. “ ICWA requires active efforts while ASFA talks about reasonable efforts. However, for many DSS workers and supervisors articulating the difference was difficult. Active efforts were described by several DSS social workers and supervisors as case specific and “going the extra mile” for Indian children and families. According to most DSS personnel, making active efforts is truly a challenge given the lack of services and placement resources throughout the state.

Qualified Expert Witnesses

Practices throughout the state differ on the use and designation of expert witnesses in ICWA cases.

- Some judges report that they do not routinely accept DSS social workers as ICWA experts and instead require outside expert testimony on foster care placement and termination of parental rights. Other judges indicate they readily accept DSS social workers as expert witnesses if they are qualified and have the appropriate experience. Other judges indicate that they have no choice because of the lack of non-DSS expert witnesses in their circuit.
- Generally, DSS social workers and supervisors report that they are uncomfortable acting as ICWA experts because of the appearance of agency bias. While they are less uncomfortable with testifying as ICWA experts in others' cases, there is definitely a reluctance to testify in their own cases as ICWA experts.

Placement of Child Pursuant to ICWA Preferences

According to many DSS social workers and supervisors, the placement preferences provisions of ICWA are the most difficult aspect of ICWA compliance. This is primarily due to a lack of suitable or identified relative options and, secondarily, a resource issue due to the lack of American Indian foster families.

- According to DSS social workers, parents are asked at several points (during DSS involvement) to identify relatives for placement.
- When an Indian child is available for an adoption, DSS posts the child's information on a national website in order to locate an American Indian adoptive family.
- Due to the demands of their caseloads, however, DSS social workers are limited in their ability to perform independent investigations for relative placement separate and apart from the information provided by the parents.

Children in Need of Services (CHINS) Cases

The results of the focus groups point out that the application of ICWA in CHINS cases is inconsistent throughout the state. This may be due to reported factors including: the interpretation that ICWA is not applicable in CHINS cases; the infrequency with which CHINS children are removed from their homes during these proceedings; and the lack of interest and/or resources of the tribes to date.

E. Findings: Tribal Focus Groups

Participants included tribal judges, tribal attorneys general, ICWA workers, BIA social workers, ICWA legal assistants, tribal prosecutors, a tribal community health representative, ICWA program directors, child protective services case managers, non-profit Indian organization children's advocates, Indian therapists, and tribal Early Head Start Family advocates. During each tribal focus group, a written consensus statement was prepared by participants based on the discussion.

The consensus statements adhere to a three part approach including: (1) identifying ICWA sections and issues of non-compliance by the state; (2) ranking the ICWA non-compliance areas that are most critical and need to be resolved first; and, (3) suggesting possible strategies to remedy the non-compliance.

Tribal focus group participants provided a non-compliance statement linked to a corresponding ICWA section. The most frequently expressed issues are:

- Failure of the state to provide sufficient information on the child to enable the tribe to determine whether the child is an "Indian child."
- Delay in sending notification to the tribe; thereby, making the tribal presence in the case ineffective for purposes of providing culturally appropriate rehabilitative efforts, finding relative placements, and adequately preparing for court hearings.
- Receiving insufficient information as to the DSS services provided to the family making it difficult for the tribe to make informed decisions in the best interests of the child and family.
- Meeting the placement preferences in ICWA. Groups stated that there is a critical need to more timely and efficiently finish a home study on the Indian child's relative's reservation home in order for ICWA placement preferences to be met.
- The lack of training and knowledge on the part of DSS workers related to the understanding of traditional family relationships and tribal culture and rehabilitative efforts resulting in a failure of the state to provide "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.
- Although not related to any ICWA specific requirement, most of the groups expressed a need for the state to recognize that the tribal ICWA workers are under severe financial hardships and are not always able to take the time to travel to a hearing. There is a disproportionate burden on the tribes because of the differing levels of staffing, human resources, financial resources, and geographic isolation of the reservations.

F. Findings: Intensive File Reviews

Four files were selected at random for an intensive file review. Findings fall into the following areas: the manner and timeliness in which notice is provided to tribes; the specific activities taken by state workers to place Indian children according to the placement preferences; the kind and extent of “active efforts” made by state workers to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; the extent to which cultural considerations were included as part of the actions and determinations made by DSS and the courts in case management; and the degree to which the best interests of the child have been met.

Proper Notice of Proceedings Involving an Indian Child (Identification of Children as Indian for the Application of ICWA)

Identifying the process used by DSS to determine whether the child was an “Indian child” was the most difficult task as there were neither uniform notations made in the files nor uniform forms used by DSS.

- In one file, the family had a prior case with DSS three years before, and the child was identified as an Indian child in the prior case, yet it took DSS almost two months after the court hearing and out-of-home placement date to send notice to the tribe in the second case.
- In three of the cases, the notice sent to the tribe occurred from one month after the 48 hour hearing to three months after the 48-hour hearing.
- In one of the four files, notice was sent to the tribe on the same date the children were taken out of the home.
- Frequently, the child and parent were referred to as “Native American” with no indication as to which specific tribal affiliation the child or parent(s) belonged for purposes of tribal notification.

Placement of Child Pursuant to ICWA Preferences

It was difficult to ascertain without extensive file review whether the ICWA placement preferences were followed in the out-of-home and permanent placement for the child. While the lack of documentation is a limitation in determining placement preferences, other barriers include:

- Family members are not encouraged to participate in a diligent search for relatives.
- In most cases, DSS caseworkers sent a short letter and standard form asking the tribe to identify family members.
- No record was found in any file reviewed that a tribe responded to this request.
- In the majority of files reviewed, the family system identified was limited to parents and grandparents and failed to indicate that other relatives had been identified.
- Compliance with these placement preferences differed markedly and it appeared that no standardized process for achieving compliance with ICWA placement preferences is being utilized.
- The court is taking the lead from DSS in making the determination that good cause exists to deviate from the ICWA placement preferences.
- There is a lack of documentation in one of the files as to why listed American Indian kinship placements had been determined to be inappropriate.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

Failure to recognize early in the case that a child is American Indian negatively affects DSS' ability to engage in active efforts and follow other provisions of ICWA and provide timely notification to the tribe.

- In several of the cases, early identification of the child as American Indian did not take place.
- Three of the four cases showed a reasonable number of casework interventions consistent with active efforts.
- In the fourth case, no activities that would reflect active efforts were noted.
- The files reviewed indicated a lack of referrals and collaboration with community agencies, tribal programs, and other culturally appropriate services.
- Evaluations and assessments on children and other family members lacked any recognition of American Indian tribal or cultural identity, possible cultural strengths, or that any cultural factors were considered in the conclusions reached by the evaluators.
- In one case, the court consistently used the "reasonable efforts" standard in error when the standard should have been "active efforts." The court order used the term "reasonable efforts" consistently in case orders.
- DSS caseworkers show either a lack of understanding or a lack of commitment to working with extended family and keeping children connected to extended family members, customary relatives, and other tribal people.

G. Concluding Remarks

The NCSC/NAIIS review of state agency information through case file review and focus groups found that the state agencies are partially in compliance with many of the technical

aspects of ICWA, but not with others, such as, sending timely notification to tribes ten days prior to state court hearings involving foster care placements or terminations and the application of ICWA in CHINS cases. Additionally, the lack of direct evidence within state files of compliance documents such as inclusion of notification letters to tribes sent registered mail, return receipt requested, is another impediment to measuring the degree of compliance. These shortcomings indicate that much work needs to be done in achieving the true spirit and intent of ICWA.

H. Review Team's Recommendations

As a result of the findings contained herein, the NCSC/NAILS project team makes the following recommendations.

Recommendation 1. The South Dakota Guidelines should be revised to accurately state ICWA requirements.

Recommendation 2. South Dakota should review the activities of other states (discussed herein and appended to this report) to determine their applicability and acceptability.

Recommendation 3. All judicial circuits should require that an ICWA affidavit be filed in every case involving an Indian Child.

Recommendation 4. A clear statement of whether the foster care and pre-adoptive placement for each child is in accordance with ICWA preferences should be placed in every file.

Recommendation 5. A clear statement that parents and the tribe have the right to review court documents should be included in the notice of hearing on Petition for Abuse and Neglect.

Recommendation 6. Certificates of Mailing should clearly indicate which documents were included in the mailing.

Recommendation 7. The contact person for each of the Indian tribes in South Dakota should be identified and updated quarterly to ensure that the proper representative of the tribe is receiving notice.

Recommendation 8. "Register of Actions" should be kept in each file.

Recommendation 9. ICWA should be mandatory subject matter for all child welfare and CHINS professionals. All state agencies should review their current training opportunities and curricula in order to develop and or enhance ICWA training. It is especially important that ICWA training focus on the specific responsibilities for each state stakeholder group.

Recommendation 10. DSS should continue to clarify and train social workers regarding “ICWA contacts” case documentation. Quality assurance of all contact data fields should be performed periodically.

Recommendation 11. UJS should convert the “ICWA” and “race” data fields in its automated civil case management system to mandatory fields for case-related data entry. Additionally, initial and refresher trainings for clerks of court should emphasize these data fields.

Recommendation 12. All state and private adoption agencies should designate specific local, regional, and state-level ICWA employee resources within their organizations. For DSS and UJS, this may include specifically designated ICWA positions. For the private adoption agencies, this might include a specifically designated individual within the private agency “network.” This information should be widely disseminated throughout each organization.

Recommendation 13. Each state agency should develop written standards and protocols discussing ICWA and its practical application. For those that already have written standards in place, these documents should be reviewed and updated at regular intervals. It is especially important that ICWA standards and protocols focus on the specific responsibilities for each state stakeholder group.

Recommendation 14. The tribes should develop standardized forms for DSS and make them readily available for immediate use.

Recommendation 15. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian child. This information should be included for the record of the case and the court order. Moreover, the UJS should adopt the standards and practices set out by the National Council of Juvenile and Family Court Judges- Indian Child Welfare Act Checklists for Juvenile and Family Court Judges, June 2003. These checklists articulate best practice standards for the state court processing of ICWA cases.

Recommendation 16. DSS and the state attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs. This should include uniform language and format.

Recommendation 17. In ICWA cases, judges should appoint attorneys who are knowledgeable of and functional in abuse and neglect proceedings, child welfare issues, treatment and rehabilitative services, and ICWA for effective representations.

Recommendation 18. Judges should appoint attorneys for all parents, including those who are not present during the hearings and/or those who are served through publication.

Recommendation 19. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e. three completed ICWA cases, advanced training in ICWA, and the services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert witness in their own cases.

Recommendation 20. DSS and private adoption agencies should actively engage the tribes to determine the availability of cultural and heritage events. The tribes should provide monthly listings of cultural activities to DSS and private adoption agencies.

Recommendation 21. DSS should consider hiring “child placement investigators” to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.

Recommendation 22. All of the state agencies involved in CHINS cases must develop a realistic and consistent protocol for the application of ICWA in CHINS cases. At a minimum, (1) state attorneys should include an ICWA statement in the petition and notice the tribes, and (2) judges should make active inquiry and a record (at each stage of the proceeding) whether ICWA is applicable. This information should also be included in the court order. Each tribe should develop a consensus regarding how they are to respond to CHINS.

Recommendation 23. Attention should be paid to developing a broader and culturally congruent definition of family for use in cases involving American Indian children. A more culturally congruent definition of family could allow caseworkers to feel more comfortable in engaging extended family members and customary and tribal relatives in providing support and cultural connection to American Indian children, especially when these children are placed with non-Indian foster parents. Keeping children connected to extended family and tribal people exhibits willingness on the part of DSS to comply with active efforts and prevent the break up of the Indian family.

Recommendation 24. DSS personnel could benefit from training and information on how to locate, refer, and collaborate with community agencies (especially those serving American Indians) and American Indian service providers in order to increase the opportunities for American Indian families to receive culturally appropriate services. Referring families to services specific to American Indians and/or incorporating these services into family service/treatment plans can increase the likelihood of compliance and completion of family service plan goals.

Recommendation 25. Service to American Indian families could be enhanced by DSS incorporating a strengths-based family systems perspective into its work with American Indian families. By viewing families from a strengths and systems perspective, workers can move from solely focusing on re-mediating the deficits of the parent(s) to strengthening and building the capacity of other parts of the family system that may have more potential for protecting and nurturing the children. A family systems perspective is also more culturally congruent in that it allows for recognition of the important traditional cultural roles that other family members may play in the raising of children.

Recommendation 26. The provision of active efforts can be strengthened by caseworkers becoming more hands on or directly involved in helping clients achieve the goals outlined in the family service/treatment plans. For example, rather than simply providing a mother with the phone number of a program that provides parenting classes and expecting her to set up classes, the caseworker and mother could together visit with a program representative to discuss how the class will meet the needs of the mother and then discuss any barriers, such as transportation, childcare, or work schedule, that might make it difficult for the mother to attend classes.

Recommendation 27. In conducting a diligent search for relatives, DSS staff can be more effective by actively engaging the parent(s) and other family members in identifying relatives and completing the required form. In the case file review, it was observed that, in place of engaging the family in identifying its members, the caseworker often sent a letter and form to the tribe asking that it identify relatives.

Recommendation 28. A more thorough identification of family members (including customary relatives) can provide a list of potential placements for a child. This identification of family members should be completed even when children are placed with kin—in the event that the initial kinship placement disrupts.

Recommendation 29. When American Indian children must be placed with non-Indian foster/adoptive families, it can be helpful to identify a cultural mentor or resource person who can work with the family to identify ways to keep the child connected to his/her tribal culture and assist the non-Indian foster/adoptive family members to better understand the child's cultural needs.

Recommendation 30. It is important that DSS staff and non-Indian foster/adoptive parents recognize that a child's cultural identity development is an ongoing process that begins at a very young age. As such, toddlers and young children, as well as school-age children and adolescents, can benefit from interventions and services that assist them to build a positive American Indian identity and help them feel comfortable with and connected to their cultural

practices and traditions. This is especially critical for American Indian children who have been placed in out-of-home care with non-Indian families

Recommendation 31. DSS staff and other professionals could benefit from training on how to appropriately and comfortably engage American Indian family members in a discussion of the effects of culture in their lives and an exploration of family members' levels of cultural identification. This type of discussion can build rapport and can assist service providers in connecting family members with services and supports that are more culturally appropriate and relevant to family members' needs.

Recommendation 32. All state agencies should review their current ICWA documentation practices to identify gaps in documentation and potential ICWA compliance omissions. This will ensure that each agency's compliance actions of ICWA requirements and spirit are well documented.

Recommendation 33. There should be a South Dakota annual statewide ICWA state and tribal summit to address: (1) communication, collaboration, and coordination between state and tribal entities; (2) state and tribal resources; and the (3) state and tribal training.

Recommendation 34. The shortage of resources for tribal programs should be addressed in order to institute the development of a comprehensive working relationship between the tribes and the state. The tribes and the state should work together with Congress and the Federal departments for this additional funding need. This topic should be included in the annual statewide ICWA summit.

Chapter VIII

ICWA Commission Recommendations (Prioritized)

VIII ICWA COMMISSION RECOMMENDATIONS

The following comprehensive prioritize list includes all the recommendations made by the commissioners based on testimonies and documents examined during its period of review. The original list of seventy-five (75) recommendations have been reduced to sixty-four (64) as a result of the commissioners' deliberative discussions, analyses, and voting. The list begins with the highest priority.

Recommendations Number 1 to 5

- Extend the service of the ICWA Commission for one year in order to provide guidance and assist in the implementation of its recommendations.
- Create a position for a statewide ICWA coordinator to help enforce a statewide ICWA compliance plan (In the Interests of D.M., R.M., III and T.B.C., 2004 WL 1689673 (SD), 2004 SD 90).
- Department of Social Services should offer to each tribe in South Dakota the opportunity to enter into a contract to enable the tribe to provide full child welfare services to its children domiciled on its reservation, including foster care licensing, Title IV-E payments, and administrative capacity.
- Encourage the Department of Social Services to work with each tribe to identify qualified expert witnesses whose testimony will be relied upon by state courts and not just utilize those experts who will conform their opinions to the requested actions of DSS. Department of Social Services shall contact Tribal Community Colleges to identify persons who could serve as qualified expert witnesses.
- Whenever possible, DSS and State's Attorneys shall provide tribes with notice of 48 hour hearings and the opportunity to participate, by telephone or in person. When the tribe indicates a desire to participate, the Circuit Court shall consider the input of the tribe in determining whether an emergency situation exists and whether a continued out-of-home placement is necessary and whether extended family members are available to provide care for the child. DSS and the State's Attorneys shall attempt to introduce qualified expert witness testimony at the 48 hour hearing.

Recommendations Number 6 to 10

- Create family placement specialist teams with representatives from the Department of Social Services and each tribe to search for relatives.
- Proactively recruit American Indian foster homes throughout the state.

- Revise the format of the PRIDE classes to include culturally appropriate parenting practices. Consider contracting with a tribal community college or colleges to train American Indian foster care providers to expand the pool of providers and make PRIDE classes more culturally appropriate.
- Enter into agreements with each tribe and provide appropriate training so that the tribes may license their own foster homes both on and off the reservations. The Department of Social Services shall honor tribal licenses pursuant to 25 U.S.C. Section 1931(b) and children in homes shall be eligible for all state and federal benefits.
- Create a statewide ICWA office within state government.

Recommendations Number 11 to 15

- Provide tribes before every meeting, if necessary by fax, copies of all DSS reports generated by workers. This includes 48 hour emergency hearings if DSS has determined the tribal affiliation of the child prior to the hearing.
- Tribes should fully staff and fund ICWA offices, as a top priority, to include paralegals and attorneys. Full staff and fund the juvenile and family courts on each reservation.
- Expand family group conferencing to each reservation.
- Create a brochure to be handed out to families in court explaining the Indian Child Welfare Act and their rights under the Act.
- Develop a protocol for transfer of cases from state to tribal court including those cases where DSS maintains the child in foster care placement and provides services. DSS shall work with each Indian tribe to apprise them of the options available to DSS and the tribes for paid placements under the Interstate Compact Act for Indian Children transferred from out of state.

Recommendations Number 16 to 20

- Increase the resources necessary to quickly and thoroughly complete home studies. Delays hold up kinship placements and jeopardize placement options.
- Tribes should keep DSS, the South Dakota Attorney General, State's Attorneys and the Circuit Courts regularly apprised of any change in tribal law regarding child protection issues including any tribal resolution or amendments to tribal law changing the order of preference for foster care and adoptive placements for the children of that tribe.
- UJS should also fund a statewide ICWA coordinator to work with the DSS counterpart to serve as a liaison between courts, DSS, and the tribes. Furthermore, this coordinator should work to implement the many recommendations contained in this report.

- Request the Supreme Court to update the South Dakota Guidelines for Judicial Process for Child Abuse and Neglect Cases (SD Guidelines – “The Green Book”).
- When action venued in state court, involving children domiciled off the reservation, are transferred to tribal court, DSS, if so ordered by the tribal court, will maintain legal custody, similar to placements by tribal courts with DSS for reservation domiciled child red, and the tribal courts shall commit to conducting court proceedings in a manner that accommodates the families of off-reservation children and witnesses. DSS and the tribes that take advantage of this opportunity shall develop procedures for such cases addressing issues such as the applicability of ASFA to such children and other matters.

Recommendations Number 21 to 25

- Tribes should respond to DSS contacts either by telephone or in writing to assure regular communications with DSS workers to prevent the perception by DSS or state court that the tribe is not desirous of participating in a pending state court proceeding.
- Promote open adoptions whenever possible to provide for contact with American Indian family members.
- DSS shall accept tribal home studies for on-reservation extended family members in determining foster care and adoptive placements under 25 U.S.C. Section 1915.
- Provide cultural awareness training for all judges, state’s attorneys and CASA workers. Consider utilizing the Native American Training Institute (Bismarck, North Dakota) for historical trauma, wrap around approach to family preservation, and other culturally appropriate training for persons involved with American Indian children.
- Analyze the state statutes and administrative rules governing the Central Registry to determine if there are unnecessary restrictions. Consider amending the rule to provide more due process for those placed on the Registry.

Recommendations Number 26 to 30

- Encourage DSS, State OCSE, and Tribal OCSE to assist in determining the paternity of every American Indian child in DSS care or a potentially Indian child (dependent upon paternity establishment) by requesting genetic testing for these children. Identify fathers even if incarcerated or hard to locate. Do not challenge paternity acknowledgements by American Indian fathers provide they comply with tribal or state law.
- DSS children protection workers should be well qualified with a minimum of a baccalaureate degree and be familiar with the cultural norms of each reservation in their service area.

- Require the Department of Corrections (DOC) to notify tribes of any placement of an American Indian child in an out-of-home placement based upon a finding that the Indian child has been abused or neglected while in DOC care. Tribes should also be notified when the DOC determines it cannot return a child to the parents' home. DOC shall work closely with Indian tribes to identify family members who could take placements of Indian children in its care.
- Notify the tribe of permanency planning meetings regardless of whether the tribe has intervened in the state court proceeding. If a tribe has intervened in a proceeding, the tribe should be notified of every change of placement of the child. Tribes should be notified of any proceeding involving a child in foster care that may result in the child being placed with the Department of Corrections because of delinquent behavior.
- For those children placed with DSS by tribal courts, seek and obtain explicit permission from the tribal courts prior to making an off-reservation placement of an American Indian child.

Recommendations Number 31 to 35

- Pass some form of the state ICWA bill after appropriate input from all stakeholders, including DSS, the South Dakota tribes, private adoption agencies, and state court judges. Identify which issues are unclear under the federal law (e.g. difference between active efforts and reasonable efforts, compliance with placement preferences in voluntary adoptions, rights of tribes to transfer preadoptive and adoptive placements, etc.) and try to clarify in the state law.
- DSS and State's Attorneys must make an immediate determination of jurisdiction after the filing of an abuse and neglect proceeding by determine the domicile of the parents of the child and whether the child is a ward of a tribal court, especially in those areas such as Rapid City, Wagner, Winner, Kadoka, Hot Springs, Mobridge and Chamberlain where the percentage of American Indian children is high and parents frequently move on and off the reservations.
- Protect and acknowledge the rights of Indian custodians as parties in the action and to intervene and participate fully, including the right to counsel in abuse and neglect actions. Develop a form or checklist for DSS workers that include the definition of *Indian custodian* under ICWA so the worker can check whether a custodian exists.
- Establish a child protection team on the Cheyenne River Reservation comprised of state, tribal, and BIA entities.
- Support the tribes in their efforts to seek changes in federal law to allow tribes direct access to Title IV-E funds based on accurate population data.

Recommendations Number 36 to 40

- DSS and the State's Attorneys shall make every attempt to notify Indian tribes of a mother's maiden name and known extended family members of an Indian child when notice is given pursuant to 25 U.S.C Section 1912 to allow the tribes to make informed decisions of the membership or eligibility for membership of Indian children.
- DSS shall consider on-reservation placements with extended family members for off-reservation children and tribes shall agree that such placements shall not deprive the State Courts of continuing jurisdiction over the child or children.
- Amend state statutes and/or Supreme Court rules to provide that incorporated tribes can appear in court through their ICWA directors, or other persons designated by the tribes, who are not licensed attorneys.
- Provide multidisciplinary training opportunities such as a yearly statewide ICWA conference for social workers, attorneys, CASA volunteers, state and tribal judges, and tribal child welfare officials.
- Rewrite the applicable Administrative Rules for South Dakota to expand the family eligibility requirements for TANF.

Recommendations Number 41 to 45

- When a case is transferred to the tribe, assure that a copy of the DSS case file is delivered to the ICWA office and the tribal court exercising jurisdiction.
- Encourage DSS to utilize on-reservation extended family members as placement options and not deny such placements merely because the family members reside outside state court jurisdiction.
- Defer to tribal law regarding the necessity of filing termination of parental rights proceedings when DSS has custody of children by tribal court order. DSS shall immediately clarify with the Administration for Children and Families (ACF) and Health and Human Services (HHS) whether the provisions of the Adoption and Safe Families Act (ASFA) applies to Indian children placed by tribal courts and notify the tribes of the opinion of the ACF.
- DSS workers shall meet regularly on the reservations with ICWA representatives with the list of pending files to engage all parties in discussions on how to get Indian children into permanent homes.
- Expand the CASA program to every South Dakota reservation.

Recommendations Number 46 to 50

- Recruit and hire more American Indian social workers.
- Circuit court judges should allow tribes to appear whenever possible by telephone conference call.
- Continue the monthly meetings of ICWA Directors with Child Protection Services.
- Hold PPRT meetings on reservations, especially in those cases involving reservation domiciled children, and invite interested relatives (e.g., meetings in Ft. Thompson rather than Chamberlain). DSS shall provide transportation for family members for PPRT meetings held off the reservation if family members do not have adequate transportation.
- Provide the tribes the opportunity to have input in the Program Improvement Plan prepared by DSS.

Recommendations Number 51 to 55

- Amend state statutes to provide tribes with copies of the Order of Adoptions and family relationship information so that children can later seek enrollment and membership in a tribe.
- Train law enforcement officers at the Law Enforcement Academy about child protection and ICWA issues.
- Invite Don Schmidt from North Dakota to provide joint tribal-state training on funding options for tribal-state cooperative agreements including Title IV-E, IV-B, XIX, and the options tribes have for providing the match requirement of Title IV-E.
- Identify those issues that are problematic for Indian tribes regarding DSS and Circuit Court compliance with ICWA standards and propose appropriate legislative or rule making change to correct those practices.
- Circuit Courts should apply the provisions of the Indian Child Welfare Act (ICWA), especially with regard to the requirements for termination of parental rights, to step parent adoption proceedings and not utilize the state law regarding abandonment.

Recommendations Number 56 to 60

- State's Attorneys should meet personally with tribal judges, prosecutors, and ICWA Directors located on reservations.
- Encourage DSS and BIA to collaborate to clarify who will investigate child protection issues on the Yankton Sioux Reservation and in which court cases should be filed.

- Continue to provide to all Indian tribes in South Dakota a list of Indian children in its care on a monthly basis and the length of time in DSS care, similar to the notification of tribes with Title IV-E agreements presently received from DSS.
- Tribes will keep DSS, the Attorney General, the State's Attorneys and the Circuit Courts regularly apprised of any change in tribal law regarding child protection issues including any tribal resolution or amendments to tribal law changing the order of preference for foster care and adoptive placements for the children of a particular tribe.
- Circuit court judges should meet on the reservations with tribal court judges, personnel and DSS workers, to assure effective communication and build relationships between the courts and state and tribal personnel. (In the Seventh Circuit, judges have traveled to Rosebud and Pine Ridge in the last year to discuss cases where relative placements are needed with tribal officials and DSS.)

Recommendations Number 61 to 64

- Encourage state CASA volunteers to continue providing services to the child after transfer of jurisdiction if it is feasible.
- Require the DSS, when called upon to provide a court report in private adoption proceedings commenced by adoption agencies, advise the court and the agency if jurisdiction is lacking in state court under ICWA and whether the private agency has adequately attempted to comply with placement preferences.
- Circuit courts should consider permitting the tribal courts to utilize their chambers and courtrooms to conduct hearings to accommodate children and witnesses in state jurisdiction.
- Circuit courts should make independent determinations of whether a proceeding involves an Indian child even when the tribe identified has failed to respond to inquiries.